TABLE OF CONTENTS.

	Page.
1. History and statement of cases	13–21
(*a*) Action of Commission and its orders	17
(*b*) Action of the courts below	18
(*c*) Assignments of errors	18–21
2. The pleadings	22–26
(*a*) The complaints before the Commission and the bills of complaint in court present the same three charges, namely, that the rates of the defendants to the shorter-distance points are (1) unreasonable in themselves, in violation of section 1 of the law; (2) unjustly discriminatory as between the shorter and the longer distance points, in violation of section 3 of the the law; (3) and in violation of the long and short haul rule of section 4 of the law	23–26
3. Error of circuit court of appeals in holding that the Commission was not called upon to consider the reasonableness in themselves of the rates to the shorter-distance points under section 1.	26–28
4. Error of the circuit court of appeals in holding that the reasonableness in themselves of the rates to the shorter-distance points was not involved in the charge that these rates violated the long and short haul rule of section 4	28–29
5. Error of circuit court of appeals in holding that the Commission was not called upon to consider the lawfulness of the rates under section 3	28
6. Cases before the court are proceedings *de novo*, original and independent suits based on new pleadings and new evidence	30–34

Page

7. In causes of this character before the courts errors of the Commission in proceedings before it are immaterial if conclusion arrived at is justified by "the entire body of the evidence" before the courts 35
   (*a*) Error of the Commission in refusing to consider competition by carriers subject to the act, except under the proviso to the fourth section of the act, immaterial in these causes .. 36
   (*b*) Distinctions in respect to this matter between the "Behlmer Case" and the present cases.. 37-39
8. Alleged error of the Commission in basing its orders on section 4 alone 39
9. Section 3 may apply where section 4 does not 39
10. Courts may, if necessary to the ends of justice, modify the order of the Commission 40
11. Power of the Commission to enforce sections 3 and 4 of the law recognized by this court 41
12. Plea of competition 43
   (*a*) Answers thereto 44, 45
   (*b*) Cases in which and extent to which competition may justify exemption from the restraints of sections 3 and 4 of the law 46-50
   (*c*) Competition which affects rates not conclusive. 50
   (*d*) Other matters besides competition to be considered 51
13. EXCESSIVENESS OF RATES TO SHORTER-DISTANCE POINTS.. 53
   (*a*) Competition can not justify excessive rates.... 53
   (*b*) The rates in question in these cases 54-59
14. EXCESSIVENESS OF RATES TO SHORTER-DISTANCE POINTS, CONTINUED 60
   (*a*) Summary of grounds upon which it was contended in the courts below, and is now claimed in this court, that the rates to the shorter-distance points are excessive 61, 62
   (*b*) Error of circuit court of appeals in holding that there was no evidence or facts "*tending to show*" unreasonableness or excessiveness of rates to shorter-distance points 60, 61

Page.

15. Excessiveness of rates to shorter-distance points, continued 63

(*a*) Excessiveness inferred from fact that materially lower rates are charged and have been charged for a long series of years to the longer-distance points and those lower rates are presumptively reasonably remunerative for the longer hauls 63–65

(*b*) The lower rates for the longer hauls are also proven by testimony of railroad officials to be reasonably remunerative for those hauls .. 65

(*c*) Testimony of railroad officials on this point ... 66–68

(*d*) Meaning of words "reasonable compensation above cost of service," "rates reasonable in and of themselves," "proper remuneration over and above cost of service," "sufficient revenue over and above cost of service," used in said testimony 69–73

16. The two horns of the dilemma 74

(*a*) If rates to longer-distance points are reasonably remunerative, then materially higher rates to the shorter-distance points are more than reasonably remunerative, and therefore excessive 76

(*b*) If rates to longer-distance points are *not* reasonably remunerative, then part of the burden which should be borne by the traffic to those points is taxed upon traffic to shorter-distance points (*Smyth* v. *Ames*, 169 U. S., p. 541.) 75–77

17. Cost of service an element to be considered in determining reasonableness of rates 78

(*a*) Distance adds to the cost of service and also to the *fixed charges* 79

(*b*) Cost of service to shorter-distance points less than to Opelika and Atlanta on account of longer hauls to latter points 78

Page.

18. RATES TO LONGER-DISTANCE POINTS FIXED BY AGREEMENT AND NOT BY COMPETITION 81

(*a*) Where rates are fixed by agreement between competing lines they will be *higher* than rates which are the product of competition (171 U. S., 505) 82, 83

(*b*) The very object of the agreement under which the rates to the longer-distance points were established was to get rid of unreasonably low rates brought about by competition, and to establish and maintain reasonably high rates 83-85

(*c*) The ground upon which the right to charge higher rates to shorter distance points is based is that competition has forced the carriers to charge unreasonably low rates to the longer distance points 87

(*d*) When rates to competitive points are reasonably high, whether left so by competition or made so by agreement, there is no justification for higher rates to shorter distance points 87

(*e*) Admission by counsel for the carriers 86

(*f*) The long maintenance of these rates shows they are not affected by competition 86

(*g*) True inwardness of the situation 88-89

19. EXCESSIVENESS OF SHORTER DISTANCE RATES, CONTINUED 91

(*a*) Excessiveness shown by comparison of rates per ton per mile to shorter distance points with the average receipts per ton per mile and estimated cost of carrying 1 ton 1 mile on traffic in general on different lines of carriers throughout the country 91-108

(*b*) Conflicting opinions by counsel for the carriers and his witnesses in reference to this matter. 103

(*c*) Testimony of railroad officials as to the value of average receipts per ton per mile and estimated cost of carrying 1 ton 1 mile as indicating, *by comparison*, excessiveness of rates. 98-101

Page.

20. EXCESSIVENESS OF RATES TO SHORTER DISTANCE POINTS, CONTINUED 109

(a) Rates to shorter distance points excessive, BECAUSE THEY ARE COMBINATIONS OF THROUGH AND LOCAL RATES 109–112

(b) The hauls to the shorter distance points are through hauls and not part local and part through 112–117

(c) Local rates made to cover the extra expense of local hauls, *prima facie* excessive as parts of through rates made for through hauls 118

(d) Georgia railroad commission rates made to cover the extra expense of local hauls, and therefore excessive as parts of through rates. 119

(e) Misleading statements of counsel for carriers on this subject 120, 122

21. COMBINATION OF THROUGH AND LOCAL RATES, CONTINUED 125

(a) Effect of combination of through and local rates on basing points or trade centers and on shorter distance surrounding points 125–132

(b) It builds up the basing points or trade centers at the expense of surrounding localities by—

First, Enabling merchants at basing points or trade centers to compete on equal terms with merchants at surrounding points on the streets of the latter 126

Secondly, By excluding merchants at surrounding points from territory between such points and the basing points or trade centers, and by thus giving the merchants of the latter a monopoly in this territory 127

(c) Motive of the carriers in establishing this system: It enables them to secure the rates for two hauls, one a through rate and one a high local rate, whether the two hauls are made or not 132

Page.

22. THE SOUTHERN TRADE CENTER SYSTEM 135
(a) The *combination of through and local rates is* known as the Southern Trade Center System, and prevails as a rule in Southern territory and not elsewhere 135
(b) The long and short haul rule of section 4 of the law aimed at this system 135
(c) Comments of Judge Cooley and Mr. Aldace F. Walker on this system 136-140
(d) Probable origin of this system 140
23. BASING POINT OR TRADE CENTER SYSTEMS OUTSIDE OF SOUTHERN TERRITORY 142
(a) Basing point system in trunk line territory 143
(b) Distinction between basing point systems outside of Southern territory and the system which prevails in that territory 143
(c) The latter violates the law, the others do not .. 143
(d) *Water competition in transportation from the Eastern seaboard to Chicago has not resulted in lower rates to Chicago than to shorter distance intermediate points* 144
(e) Lower rates to basing points or trade centers than to surrounding shorter distance points not necessary to the prosperity of the former. 145
24. OBJECTION ON THE PART OF THE CARRIERS, THAT GIVING SHORTER DISTANCE POINTS RATES NOT HIGHER THAN THOSE TO LONGER DISTANCE BASING POINTS WOULD INJURE SUCH LONGER DISTANCE POINTS 146-148
(a) It would injure no *legitimate* interest of such longer distance basing point 147
(b) If the situation were reversed? 148
25. COMPETITIVE RATES TO LONGER DISTANCE BASING POINTS NO BENEFIT TO SHORTER DISTANCE POINTS FROM A BUSINESS STANDPOINT 151
(a) They do not do away with or ameliorate the *discrimination* against the shorter distance points 151 153

Page.

26. THE DISCRIMINATION SHOWN IN THESE CASES EXCESSIVE. 154

(*a*) Competition can not justify discrimination to the extent practiced in these cases..... 170

(*b*) The amount or the extent of the discrimination a matter to be considered by the Commission and by the courts..... 155–157

27. INJURY TO SHORTER DISTANCE POINTS.....

(*a*) Testimony of merchants at the shorter distance points showing injury to them resulting from discrimination in favor of longer distance points, Atlanta and Opelika..... 159–169

(*b*) *The discriminations in these cases result in the very abuses which the act to regulate commerce was designed to remedy, and can not, therefore, be justified under that act*..... 169, 170

(*c*) *Competition, no matter how forceful, should not be held to nullify the law itself*..... 170

28. THE PREJUDICE TO SHORTER-DISTANCE POINTS "UNDUE AND UNREASONABLE" UNDER SECTION 3 OF THE LAW 171–174

(*a*) Section 3 forbids discriminations which result in "*undue prejudice or disadvantage*" to the localities discriminated against..... 171

29. MATERIALITY OF THE PROOF OF INJURY RESULTING FROM DISPARITY OF RATES RECOGNIZED BY THIS COURT IN THE "IMPORT CASE" (162 U. S., 239) 175

(*a*) Materiality of such proof shown by the language of section 3 of the law..... 176

(*b*) *The proof of injury or prejudice to the shorter-distance points made in these cases distinguishes them from the "Social Circle case" and all other cases under the act to regulate commerce which have been before this court*..... 177

Page.

30. THE "SOCIAL CIRCLE CASE" DISTINGUISHED FROM THE PRESENT CASES 178
(a) Present cases stronger against carriers than that case 179
(b) Distinctions between that case and the present cases 179, 180
(c) No water competition in present cases 180
(d) *No proof of injury to shorter-distance point in "Social Circle case"* 181
31. THE INTERESTS OF THE PUBLIC 182
(a) The interests of the public to be *first considered* 184
(b) Who are the public and what are the public interests 183
(c) Magnitude of the public interests at the shorter-distance points and in the territory surrounding them greater than at the longer-distance points 186
(d) Error of circuit court in comparing the public interests at Atlanta with those of the shorter-distance points *taken singly* 185
(e) The greater population and larger commercial interests at Atlanta and Opelika the result, in part at least, of the discriminations in their favor 187
(f) There should be a distribution of commerce and population and not a monopoly or centralization at a few favored localities 187
32. SHORTER-DISTANCE POINTS ARE COMPETITIVE POINTS 190-192
(a) If the force of competition at longer-distance points is greater than at shorter-distance points, it is not so much greater as to justify higher rates to the latter than to the former, *but at most equal rates* 192

	Page.
33. ORDERS OF THE COMMISSION	193
(a) How the orders of the Commission may be complied with	194
(b) Erroneous assumption of counsel for carriers that compliance with the orders requires either an advance of the rates to the longer-distance points or a reduction of the rates to the shorter-distance points *to the full extent* of the present difference between those rates	194
(c) May be complied with by a simultaneous advance of longer-distance rates and a reduction of shorter-distance rates in certain proportions of the present difference between those rates	194, 195
(d) Should be obeyed by reducing rates to the shorter-distance points	195
(e) Orders just and reasonable	196
(f) Orders adapted to enforcement of either section 3 or section 4 of the law	197
(g) Admission of counsel for carriers on this subject	198
34. ORDERS OF THE COMMISSION, CONTINUED	199
(a) Criticism by court below and by counsel for the carriers, that some discrimination may be practiced under them	200
(b) Commission can only approximate justice in its orders—"a half loaf is better than no loaf"	200, 201
(c) Orders in these cases of exactly the same character as order approved by this court in the "Social Circle case."	202
(d) Orders may be modified by the court	202
35. ORDERS OF THE COMMISSION, CONTINUED	203
(a) Impossible to frame an order that would not be subject to the hypercriticism of counsel for the carriers	204

35. ORDERS OF THE COMMISSION, CONTINUED—Continued. Page.
(*b*) Hypercriticism should not be indulged; the act to regulate commerce a *remedial statute, and, therefore, to be liberally construed* 204, 205
(*c*) Predictions of evil to result from enforcement of order in the "Social Circle case" and of the decree of this court in the "Trans-Missouri Freight Association case" not fulfilled 205, 206
(*d*) Such predictions in all cases 205
36. ORDERS OF THE COMMISSION, CONTINUED 207
(*a*) Orders *prima facie* lawful 207
(*b*) Burden upon the carriers to show that they are unlawful 207, 208
(*c*) Not sufficient to raise a doubt; must be enforced *unless clearly erroneous.*
37. ORDERS OF THE COMMISSION, CONTINUED 209
(*a*) Reduction of rates to shorter distance points will not result in *ultimate* loss of revenue to carriers 210-218
(*b*) Such reduction will enlarge the business and hence increase the tonnage of traffic to shorter distance points 212
(*c*) Opinion to that effect of this court in the "Joint Traffic Association case" (171 U. S., 505) ... 212
(*d*) Testimony to that effect of Hon. Allen Fort, a member of the Georgia Railroad Commission 213
(*e*) Testimony to that effect of merchants at shorter distance points 214
(*f*) Opinion to that effect of Mr. Aldace F. Walker, chairman of the board of executive officers of the Atchison, Topeka and Santa Fe Railway system 214-216
(*g*) Orders of the Commission do not affect rates *intrastate* traffic, but only on *interstate* traffic. 218, 219

Page.

38. ORDERS OF THE COMMISSION, CONTINUED 220
(a) Contention that the Commission favors equal mileage rates, or that its orders will result in such rates 220, 221
(b) Cost of service ignored by carriers 221, 222
(c) Importance of distance as a factor in rate-making recognized by Congress in section 4 of the law 222

39. EQUALITY OF RIGHT AND EQUALITY OF PRIVILEGE AS DISTINGUISHED FROM ABSOLUTE EQUALITY OF RATES 223
(a) Equality of rights, and not absolute equality of rates, is claimed for the shorter distance points in these cases 225

40. BURDEN OF PROOF 227–234
(a) When preferences are shown under section 3 of the law and the greater charge for the shorter than the longer haul under section 4, the burden is upon the carrier to prove a substantial dissimilarity of circumstances and conditions justifying such preferences or greater charge 228, 229
(b) Burden of proof when rates are charged to be excessive *under section 1 of the law* 229–232
(c) Charge that rates are unlawful under sections 3 and 4 involves the reasonableness of the rates under section 1 232
(d) Burden upon carriers to prove matters the knowledge of which is peculiarly in their possession 233
(e) If burden was on the complainant to show the excessiveness of the rates to the shorter distance points, it has been shifted to the carriers 230–232
(f) Counsel for the carriers, by attempting to prove by his witnesses the reasonableness of the rates to the shorter distance points, practically admitted that the burden to make that proof was upon him 234

Page.

41. NATURE OF TESTIMONY INTRODUCED BY COUNSEL FOR THE CARRIERS TO SHOW REASONABLENESS OF RATES TO SHORTER-DISTANCE POINTS..... 235-240

(*a*) *Opinions* of biased railway officials relied upon. 235

(*b*) Grounds given by those officials for their *opinions* on this subject—..... 236

First, that the rates are reasonable because lower than wagon rates 237

Secondly, that the rates are reasonable because traffic will move under them and *they are not prohibitory*..... 237

Thirdly, that the rates are reasonable because made up of competitive rates to longer distance points plus local rate fixed by Georgia Railroad Commission from longer distance points to shorter distance points..... 238

Fourthly, that the rates are reasonable because of their "relative adjustment" with respect to rates *which are not themselves proven to be reasonable*..... 239

(*c*) *Counsel for the carriers does not introduce any evidence of facts which this court has held to be competent or relevant where the reasonableness of rates is in question, although the knowledge of those facts is peculiarly in the possession of the carriers*..... 239, 240

42. OPINIONS AS EVIDENCE OF MATTERS IN ISSUE..... 241-243

(*a*) General rule that they are not admissible..... 241

(*b*) Opinions of railroad officials in these cases of no weight, because—

First, they are the opinions of the parties who are responsible for the rates complained of and who are naturally strongly biased..... 242, 243

Secondly, the reasons given for those opinions are wholly unsatisfactory 242

CHAPTER I.

HISTORY AND STATEMENT OF CASES.

Among others authorized by section 13 of the act to regulate commerce to institute before the Interstate Commerce Commission complaints against carriers, are "the railroad commissioner or railroad commission of any State or Territory."

The three cases under consideration originated from three complaints made by the Georgia railroad commission pursuant to said section 13 of the law.

CASE NO. 68.

In one of these complaints the Georgia railroad commission charged that the rates of the defendants in case No. 68, the Clyde Steamship Company, the Georgia Railroad and Banking Company, et al., *from New York and other Eastern cities to points on the Georgia Railroad between Augusta and Atlanta—to wit, Greensboro, Madison, Social Circle, Covington, Conyers, and Stone Mountain*—were, in the language of the complaint, "*unreasonable and discriminating in their nature*," and also in violation of the "*long and short haul rule*" of section 4 of the act to regulate commerce. The last charge was based upon the allegation that those rates to the intermediate points—Greensboro, Madison, Social Circle, etc.—were higher for the shorter hauls to those points than for the longer haul through those points to Atlanta.

Below is a diagram of the route involved in that case.

DIAGRAM OF ROUTE IN CASE NO. 68.

CASE NO. 69.

In another complaint the Georgia railroad commission made the *same charges* as to the rates of the defendants in case No. 69, the Western & Atlantic Railroad Company et al., from *Cincinnati to certain points on the Western and Atlantic Railroad between Chattanooga and Atlanta, to wit, Calhoun, Adairsville, Kingston, Cartersville, Acworth, and Marietta*—these intermediate localities being the shorter distance points in that case and Atlanta the longer distance point. Following is a diagram of the route involved:

DIAGRAM OF ROUTE IN CASE NO. 69.

CASE NO. 70.

In a third complaint the Georgia railroad commission made the *same charges* against the rates of the

defendants in case No. 70, the Clyde Steamship Company, the Atlanta and West Point Railroad Company et. al., from *New York and other Eastern cities to points on the Atlanta and West Point road and Western Railway of Alabama between Atlanta and Opelika, to wit, Newnan, Grantville, Hogansville, Lagrange, and West Point*—these intermediate localities being the shorter distance points in that case and Opelika the longer-distance point. Following is a diagram of the route:

DIAGRAM OF ROUTE IN CASE NO. 70.

ACTION OF COMMISSION AND ITS ORDERS.

The Interstate Commerce Commission, after due service of the complaints on the respective defendants in the three cases, and after testimony taken and argument had in behalf of all parties in interest, found that the higher rates to the shorter distance points than to the longer distance points, Opelika or Atlanta, were not justified, and in pursuance of this finding ordered the defendants in Case No. 69 to desist from charging higher rates from Cincinnati to Calhoun, Adairsville, Kingston, Cartersville, Acworth, and Marietta than they charged for the longer haul through those points to Atlanta; and in Case No. 68 ordered the defendants to desist from charging higher rates from New York to Greensboro, Madison, Social Circle, Covington, Conyers, and Stone Mountain than they charge for the longer haul through those points to Atlanta; and in Case No. 70 ordered the defendants to desist from charging higher rates from New York and other Eastern cities to Newnan, Grantville, Hogansville, Lagrange, and Westpoint than they charged for the longer haul through these points to Opelika.

The defendants refused to obey these orders of the Commission, and thereupon the Commission, under section 16 of the act to regulate commerce, instituted in the circuit court of the United States for the north-

ern district of Georgia the present proceedings in equity for the enforcement of said orders.

ACTION OF THE COURTS.

The circuit court rendered a decree in each of the cases denying the prayers of the Commission and dismissing its bills of complaint. The circuit court of appeals affirmed the decrees of the court below. Appeals have been duly taken to this court from the decrees of the circuit court of appeals and errors assigned.

ASSIGNMENTS OF ERRORS.

The assignments of errors were the same in all three cases. The first four are general, and assign as error the action of the circuit court of appeals, in affirming the decree of the court below, in not reversing said decree, in not rendering a decree for the enforcement of the *entire* order of the Commission, and in not rendering a decree for the enforcement of the order of the Commission as to *each* of the shorter distance points, the rates to which were involved in said cases. The *specific* assignments of error are as follows:

5. Said circuit court of appeals erred in holding that "the Commission was not" in the proceedings before it "called upon to find whether the respective rates in question were reasonable and just or not."

6. Said court erred in holding that the Commission, in the proceedings before it, "was not called upon to

find whether the rates charged to the shorter distance points gave an undue or unreasonable preference or advantage to the longer distance points, or subjected the shorter distance points to an undue or unreasonable prejudice or disadvantage in any respect whatever."

7. Said court erred in holding in effect "that on applications like this the courts are limited to a review of the grounds on which the Commission acted, and have not and should not exercise jurisdiction on the whole subject-matter, and on the law and facts determine whether the tariff of rates complained of is just and reasonable, and whether it gives any undue or unreasonable preference to the longer distance points, or subjects the shorter distance points to any undue or unreasonable prejudice or disadvantage."

8. Said court erred in holding in effect that rates established by *agreement* between competing carriers are the result of or fixed by competition, and not the result of or fixed by such *agreement.*

9. Said court erred in holding that "a careful consideration of the circumstances and conditions shown by the proof constrains to the conclusion that the difference in the circumstances and conditions has caused the difference that is complained of in the rates."

10. Said court erred in holding that the dissimilarity in conditions resulting from competition at the longer distance points is so great as to justify the discrimination in rates complained of against the shorter distance points, which are "junction points reached by more than one railroad."

11. Said court erred in holding that "the most careful consideration of the testimony brought up in the records in these causes does not disclose any evidence

that was offered by the appellant in the circuit court *tending to show* that the rates, separately considered, to the respective points are not reasonable and just."

12. Said court erred in holding that "the great volume of testimony given by the witnesses for the appellees is directly and clearly to the effect that the rates are reasonable and just."

13. Said court erred in holding that the fact as to whether or not rates are reasonable and just "is hardly susceptible of better proof than the *opinions* of 'railroad officials.'"

14. Said court erred in holding that the fact that rail rates are lower "than can be obtained by any other means of transportation" is evidence of their reasonableness.

15. Said court erred in holding that the facts that the rates in question "have not prevented the shipment of freights," and "traffic has been shipped under them with profit," are evidence of the reasonableness of such rates.

16. Said court erred in holding that the fact that the rates to the shorter distance points are made up of (or based upon) the competitive rates to competitive points, and the local rates from such competitive points to the shorter distance points, is evidence of the reasonableness of the entire through rates to the latter points.

17. Said court erred in holding in effect that rates to the longer distance competitive points which are not "fully remunerative have a tendency to reduce local rates and to improve the local service."

18. Said court erred in holding that carriers have a right, on the ground of competition, to charge to competitive points rates which do not yield "a full measure of reasonable remuneration."

19. Said court erred in holding that the appellant did not contend in said court that "the rates to any of the points, considered separately, are too high or too low, or are not reasonable and just."

20. Said court erred in holding in effect that because the order of the Commission "can not adequately meet the requirements of the first and third sections," it should not be enforced to the extent it does afford relief under those sections.

21. Said court erred in holding in effect that the order of the Commission should not be enforced because under it the appellees may still, if they see proper, discriminate against the shorter distance points in favor of the longer distance point, to the extent of giving the former as high rates as the latter, inasmuch as the order of the Commission only requires the appellees to desist from charging higher rates to the former than to the latter. (Record in case 69, pp. 265–267.)

Chapter II.

THE ISSUES PRESENTED BY THE PLEADINGS BEFORE THE COMMISSION AND IN COURT.

THE COMPLAINTS BEFORE THE COMMISSION AND THE BILLS OF COMPLAINT IN COURT MAKE THE SAME THREE CHARGES, NAMELY, THAT THE RATES OF THE DEFENDANTS TO THE SHORTER DISTANCE POINTS ARE (1) UNREASONABLE IN THEMSELVES, (2) UNJUSTLY DISCRIMINATORY AS BETWEEN THE SHORTER AND LONGER DISTANCE POINTS, (3) AND IN VIOLATION OF THE LONG AND SHORT HAUL RULE OF SECTION 4.

ERROR OF CIRCUIT COURT OF APPEALS IN HOLDING THAT THE COMMISSION WAS NOT CALLED UPON TO CONSIDER THE REASONABLENESS IN THEMSELVES OF THE RATES TO THE SHORTER DISTANCE POINTS.

ERROR OF THE CIRCUIT COURT OF APPEALS IN HOLDING THAT THE REASONABLENESS IN THEMSELVES OF THE RATES WAS NOT INVOLVED IN THE CHARGE THAT THESE RATES VIOLATED THE LONG AND SHORT HAUL RULE OF SECTION 4.

ERROR OF CIRCUIT COURT OF APPEALS IN HOLDING THAT THE COMMISSION WAS NOT CALLED UPON TO CONSIDER THE LAWFULNESS OF THE RATES UNDER SECTION 3.

1. The language of the three complaints filed by the Georgia Railroad Commission before the Interstate

Commerce Commission is, as before stated, that the rates complained of to the shorter distance points were "UNREASONABLE AND DISCRIMINATING IN THEIR NATURE AND IN DIRECT VIOLATION OF SECTION 4 OF THE ACT TO REGULATE COMMERCE."

(Record in case 69, bot. p. 7.)

This is an averment that said rates were in violation of sections 1, 3, and 4 of the law.

(a) *Rates unreasonable in themselves in violation of section 1 of the law.*

The allegation that the rates were "*unreasonable in their nature*" charges a violation of section 1 of the law which requires all rate charges to be reasonable and just in themselves.

The circuit court of appeals in its opinion sustains this proposition by holding that one of the charges in the complaints before the Commission is "that the rate of freight charged to the shorter distance point is unreasonable," and that the defendants "deny that the rates complained of are unreasonable or unjust and insist that they are in themselves reasonable and just."

(Record in case 69, pp. 268, 271.)

Counsel for the carriers practically recognized that the reasonableness in themselves of the rates to the shorter distance points was in issue by attempting to

prove their reasonableness by all his witnesses on direct examination.

(*b*) *Rates in violation of section 3 of the law.*

The allegation that the rates were "discriminating in their nature," when taken in connection with the fact that discrimination between *localities* is referred to, is a charge of violation of section 3 of the law, which, among other things, forbids undue or unreasonable preferences in rates between different *localities*.

Discrimination is a *general* term, embracing discriminations between *shippers* under section 2 of the law and discriminations between *localities* under sections 3 and 4 of the law.

Section 2 of the law does not cover discrimination between *localities*, but only between shippers. In the case of *Wight* v. *The United States* (167 U. S., p. 518), Mr. Justice Brewer, in speaking of section 2, says:

"It was the purpose of the section to enforce equality between *shippers*, and it prohibits any rebate or other device by which two *shippers* shipping over the same line, the *same distance*, under the same circumstances of carriage, are compelled to pay different prices therefor." (167 U. S., p. 518.)

The complaints in these cases relate to discriminations in the form of undue preferences between different *localities*—the shorter and longer distance

points—and not to discriminations between *shippers* under section 2. The charge, therefore, that the rates are "*discriminating in their nature*," considered in connection with the facts on which it is based, is in legal effect a charge of violation of the provision of section 3, forbidding undue preferences in rates as between *localities*.

(c) *Allegation of violation of section 4 of the law.*

The allegation that the rates in question were in violation of section 4 of the law, charges departures from what is known as the "long and short haul rule" of that section, which forbids the charging or receiving "under substantially similar circumstances and conditions a greater compensation in the aggregate for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance."

The pleadings before the court.

The petitions or bills of complaint filed in court in these cases embody, and have attached as exhibits, copies of the complaints filed by the Georgia railroad commission. These bills of complaint filed in court each allege that it had been "*made to appear to the satisfaction of said commission*" (the Interstate Commerce Commission) "*that the said defendants had violated the provisions of the 'Act to regulate commerce' in certain respects as was stated in said petition herein*

referred to as a part hereof" (petition by Georgia railroad commission). (Record in case 69, bot. p. 3.)

The bills of complaint, therefore, present for determination by the courts the questions, whether the *three charges* in the complaints of the Georgia railroad commission, to wit, the charge, under section 1 of the law, that the rates to the shorter distance points are unreasonable in themselves, and the charges under sections 3 and 4 that the rates are unduly preferential to the longer distance points, *or either of those charges*, are sustained.

The answers filed in court by the defendants traverse these three charges and aver that the rates in question are reasonable in themselves, and not *unjustly* discriminatory under either section 3 or 4 as between the shorter and longer distance points. In these answers the disparity in rates, or, in other words, the discrimination between the shorter and longer distance points is admitted, but it is averred that this discrimination is not *unjust* because of an alleged substantial dissimilarity of circumstances and conditions resulting from competition in transportation to the longer distance points.

2. *Error of circuit court of appeals in holding that the Commission was not called upon to consider the reasonableness in themselves of the rates to the shorter distance points.*

The circuit court of appeals held that the "Commission was not called upon to find whether the respective rates in question were reasonble and just or not."

(Record in case 69, p. 270; fifth assignment of error.)

We think that in this the court erred. The court places this ruling, as seen from the sentence preceding it, upon the ground that the "cases were considered and decided by the Commission as cases presenting violations of the fourth section of the act to regulate commerce." It may be conceded, *arguendo*, that the Commission did consider and decide the cases under section 4 alone and it would not follow that the Commission was *not called upon* to consider and decide the cases under section 1.

As we have seen, the complaints before the Commission distinctly averred violations of section 1, and the answers of the defendants traversed that charge. This matter was therefore presented to the Commission by the pleadings before it and, if there was evidence bearing upon it, should have been considered.

The reasonableness in themselves of the rates is also, as we have shown, put in issue by the *pleadings in court. It is therefore incumbent upon the court to consider the question, inasmuch as the proceedings in court are proceedings de novo*, as we will show in a subsequent chapter of this argument.

Furthermore, if the cases were, and could only be, considered and decided under section 4, the reasonableness in themselves of the rates was a matter relevant to, if not necessarily involved in, the issue presented under that section.

If the excess of the rates to the shorter distance points over those to the longer distance points resulted from unreasonably high rates to the former, then it is conceded that competition at the latter can not justify such excess. In *Louisville and Nashville Railroad Company* v. *Behlmer* (175 U. S., p. 649), this court (Mr. Justice White delivering the opinion) holds "*that, while the carrier may take into consideration the existence of competition as the producing cause of the dissimilarity of circumstances and conditions, his right to do so is governed by * * * the absolute command of the statute that all rates shall be just and reasonable.*"

3. *Error of circuit court of appeals in holding that the Commission "was not called upon to consider and determine the reasonableness of the rates under section 3 of the law."*

The circuit court of appeals further held that "for the same reason" (namely, that the Commission only considered the case under section 4) "the Commission *was not called upon* to find whether the rates charged to the shorter distance points gave an undue or unrea-

sonable preference or advantage to the longer distance points, or subjected the shorter distance points to an undue or unreasonable prejudice or disadvantage in any respect whatever."

(Record in case 69, p. 270; seventh assignment of error.)

As the charge that the rates were in violation of section 3 was, as we have shown, distinctly presented for determination by the Commission and is in issue before the court, what we have said on this point above in subdivision 2 of this chapter applies here.

A charge of violation of the rule of section 4, moreover, is a charge of a violation of the provision of section 3, forbidding undue preferences as between localities, because section 4 denounces a particular species of undue preferences between localities, *which is and would have been unlawful under section 3.*

By making the greater charge for the shorter than the longer haul, *which was already unlawful under section 3*, the subject of specific denunciation in a subsequent and distinct section of the law, Congress only intended to emphasize its disapprobation of this species of unjust discrimination between localities and to point it out as one of the principal evils which the law was designed to remedy.

Chapter III.

CASES BEFORE THE COURT ARE PROCEEDINGS DE NOVO, ORIGINAL AND INDEPENDENT SUITS BASED ON NEW PLEADINGS AND NEW EVIDENCE.

Throughout the opinion of the circuit court of appeals stress is laid upon the alleged fact that the "opinion and decision of the Commission proceeds and rests" only on the fourth section of the law, and the court correctly states that counsel for the Commission, without conceding that the action of the Commission was based solely on the fourth section, contended, both in the circuit court and in the circuit court of appeals—

> "That on applications like these the courts are not limited to a review of the grounds on which the Commission acted, but have and should exercise jurisdiction of the whole subject-matter, and on the law and facts determine whether the tariff of rates complained of is reasonable and just or not, and whether it gives any undue or unreasonable preference to the longer distance points, or subjects the shorter distance points to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

The circuit court of appeals does not expressly rule that this position of counsel for the Commission is incorrect, but manifestly was controlled in its decision

of the cases largely by the alleged fact that the Commission based its action on section 4 alone.

We think that the position of counsel for the Commission is in accordance with the statute and the uniform decisions of the courts—and particularly where, as in the present cases, new testimony in addition to that before the Commission was taken, *and practically new cases made out, before the courts.*

Section 16 of the act to regulate commerce, under which these cases were instituted, provides, among other things, that when a lawful order of the Commission has been violated by a common carrier—

"It shall be lawful for the Commission * * * to apply in a summary way, by petition, to the circuit court of the United States sitting in equity * * * and the said court shall have power to hear and determine the matter, on such short notice to the common carrier complained of as the court shall deem reasonable; and such notice may be served on such common carrier, his or its officers, agents, or servants in such manner as the court shall direct; and said court shall proceed to hear and determine the matter *speedily as a court of equity, and without the formal pleadings and proceedings applicable to ordinary suits in equity, but in such manner as to do justice in the premises;* and to this end such court shall have power, if it think fit, *to direct and prosecute in such mode and by such persons as it may appoint, all such inquiries as the court may think needful to enable it to form a just judgment in the matter of such petition.*"

Provision is thus made for the institution of an original suit, new pleadings, and new evidence, and the only limitation upon the court is that it shall "speedily" determine the matter involved "in such manner as to do *justice* in the premises." The leading idea of this enactment is the administration of *justice* speedily and without adherence to forms.

In construing section 16 of the law, the circuit court said in the "Social Circle case:"

"The Commission denies the power of this court to hear the case upon any other *issues*, pleadings, or facts than those presented to the Commission. It is claimed that the case is to be determined with reference to what the Interstate Commerce Commission had before it, and that *no additional issues* or questions should be raised or other evidence taken. The language of the act of Congress does not support this contention. * * * The question may be considered as settled, not only by the language of the act of Congress, but by authority, against the position assumed by counsel for the Commission." (56 Fed. Rep., pp. 934, 935.)

In the case of the *Interstate Commerce Commission* v. *Cincinnati, New Orleans and Texas Pacific Ry. Co. et al.*, Judge Sage, in delivering the opinion of the circuit court at Cincinnati, said:

"The court is to sit as a court of equity, without the formal proceedings applicable to ordinary suits in equity, but in such manner as *to do justice in the premises*. It is so provided in section 16 of the act. The intention of Congress evidently was to vest in the court *a large discretion*." (64 Fed. Rep., pp. 984, 985.)

In the case of *Shinkle, Wilson & Kreis Co. et al.* v. *Louisville and Nashville R. R. Co. et al.* in the United States circuit court at Cincinnati, Judge Lurton, in the opinion delivered by him, says:

"If it shall then" (that is, on final hearing in a suit in court to enforce an order of the Commission) "appear *on all the evidence heard and submitted* that the order of the Commission was lawful and reasonable and that it had been violated, it shall be lawful for such court to issue a writ of injunction or other proper process to prevent further disobedience of such order. Now, it is well settled that *the court is not the mere executioner of the orders of the Commission.* The suit in this court is an *original and independent proceeding.* This court is *not confined to a mere examination of the matter as heard by the Commission.* It proceeds to hear the complaint *de novo.*" (62 Fed. Rep., p. 693.)

The duty and power of the court to "inquire into the facts on its own account" and try the case *de novo* are recognized in the Import Case (162 U. S., 239).

In the recent case of the *Interstate Commerce Commission* v. *Alabama Midland Rwy. Co. et al.* (168 U. S., 175), this court says:

"It has been uniformly held by the several circuit courts and the circuit courts of appeal in such cases that they are not restricted to the evidence adduced before the Commission, nor to a consideration merely of the power of the Commission *to make the particular order* in question, but that additional evidence may be put in by either party, and that the duty of the court is to decide *as a court of equity upon the entire body of evidence.*"

It thus appears, as held by the circuit court in the "Social Circle case," that the courts have the power to hear these cases upon "*other issues, pleadings, and facts than those presented to the Commission;*" that, as held by Judge Sage in the case of the Commission against the C., N. O. & T. P. Ry. Co., Congress intended in these cases "*to vest in the courts a large discretion*" and that it is the duty of the courts as courts of equity "*to do justice in the premises;*" that, as held by Judge Lurton in *Shinkle, Wilson & Kries Company* v. *L. & N. R. R. Co.*, "*the court is not the mere executioner of the orders of the Commission,*" but "*the suit in court is an original and independent proceeding*" and "*the court is not confined to a mere examination of the matter as heard by the Commission, but proceeds to hear the complaint de novo;*" and that, as held by *this court*, in the Alabama Midland case "*the courts are not restricted to the evidence adduced before the Commission, nor to a consideration merely of the power of the Commission to make the particular order in question, but that additional evidence may be put in by either party, and that the duty of the court is to decide as a court of equity upon the entire body of the evidence.*"

As we have stated, new and additional evidence was introduced before the court in these cases.

Chapter IV.

IN CAUSES BEFORE THE COURTS ERRORS OF THE COMMISSION IN PROCEEDINGS BEFORE IT ARE IMMATERIAL, IF CONCLUSION ARRIVED AT IS JUSTIFIED BY "THE ENTIRE BODY OF THE EVIDENCE" BEFORE THE COURTS.

ERROR OF THE COMMISSION IN REFUSING TO CONSIDER COMPETITION BY CARRIERS SUBJECT TO THE ACT EXCEPT UNDER THE PROVISO TO THE FOURTH SECTION OF THE ACT.

DISTINCTIONS, IN RESPECT TO THIS MATTER, BETWEEN "BEHLMER CASE" AND THE PRESENT CASES.

ALLEGED ERROR OF THE COMMISSION IN BASING ITS ORDER ON SECTION 4 ALONE.

COURT MAY MODIFY ORDER OF COMMISSION.

In these cases the Commission held that it could not consider competition by carriers subject to the act to regulate commerce, unless it was set up by application to the Commission under the proviso to the fourth section of the act.

The Supreme Court, in the "*Alabama Midland Case*" (168 U. S., p. 175), held this position of the Commission to be erroneous. In view of the fact, however, as

shown in the preceding Chapter III of this argument, that the proceeding before the court is *de novo*, and it is the duty of the court "to do justice in the premises, as a court of equity, on the entire body of the evidence," it is immaterial what errors either of law or of fact may have been committed by the Commission in the proceeding before it, if the conclusion arrived at by the Commission is authorized by the evidence before the court.

This was held by Judge Severens in the case known as "*the Chattanooga Case*" (85 Fed. Rep., p. 110). In that case the Commission held, as in the present cases, that it could not consider competition by carriers subject to the act except on application by carriers under the proviso to the fourth section. In commenting upon this, Judge Severens says:

> "*In this undoubtedly the Commission was in error. The contrary doctrine is now well established. But this error is not material. The legal reason given may be wrong and the order right if, upon the facts, the latter should be found by the court to be warranted by law.* Nor would it affect the duty of the court if the Commission had founded its order upon one provision of the act and the facts brought the case within some other."

The question before the court, then, is whether the conclusion arrived at by the Commission was lawful, and not whether the Commission pursued the correct course or process of reasoning in arriving at that conclusion.

DISTINCTIONS BETWEEN THE PRESENT CASES AND L. & N. R. R. CO. v. BEHLMER (175 U. S., P. 648).

In the case, *supra*, known as the "Behlmer Case," the Commission made the same erroneous ruling, and this court for that reason practically remanded the case to the Commission for rehearing and reinvestigation. There are material distinctions in respect to this question, however, between the "Behlmer Case" and the present cases.

(1) In the first place, in the "Behlmer Case" the Commission proceeded in its investigation no further than to find the simple fact that the competition pleaded was by carriers subject to the act. It did not find the facts showing the nature and force of that competition. The decision of the Commission was based solely on the ground that competition by carriers subject to the act could not be considered except under the proviso.

(2) In the "Behlmer Case," the circuit court of appeals, from whose decision in favor of the Commission the case was brought on appeal to this court, sustained this erroneous ruling of the Commission and based its decision largely thereon.

(3) Little or no additional testimony was taken in the "Behlmer Case" after it reached the courts. No

new case was made out by additional testimony, and it was decided practically on the testimony before the Commission.

In all these respects the present cases are distinguishable from the "Behlmer case."

(1) In the present cases the Commission found all the facts relating to competition—not only the fact that the competition was by carriers subject to the act, but also the facts showing the nature and force of that competition.

(2) When the present cases reached the court, new testimony in addition to that adduced before the Commission and larger in amount, relating to competition and the other matters in issue, was presented to the court. *The case was reopened and practically a new case made out.*

(3) Both the courts below considered and weighed all this testimony, and the defendants have had a full hearing before the courts, both in the way of testimony and argument, on the question of competition. *They have had their "day in court" and the benefit of "due process of law" in its fullest extent.*

(4) The error of the Commission was not in failing to find the facts fully, but was an *error of law.* If the Commission had "unduly restricted its inquiries

into the facts," the court has the *discretion* to either inquire into the facts on its own account or remand the case to the Commission for reinvestigation.

(*Texas and Pacific Railway Co.* v. *Interstate Commerce Commission*, 162 U. S., 239.)

Where, however, as in the present cases, the Commission did not "unduly restrict its inquiries into the facts," but only made a mistake of law, it is eminently the function of the courts to correct such error of law.

The decision of the Commission on the facts before it can be of comparatively little value after additional testimony has been taken before the courts.

SECTION 3 MAY APPLY WHERE SECTION 4 DOES NOT.

Counsel for the carriers, while contending that the Commission erred in basing its orders, as he alleges it did, on the fourth section of the law only, yet admits that—

"Though the Commission may have erred in basing the orders made by it in these cases on the fourth section, *yet if said orders are lawful under the third section it will be the duty of the court to enforce them.*" (Printed argument for carriers.)

And again he says:

"Though the circumstances and conditions at the longer distance points may be substantially dissimilar

from those at the shorter distance points, and though such dissimilarity may take the case out of the operation of the fourth section, the third section remains; and if it can be shown that the disparity in rates constitutes an undue preference of the longer distance points, the orders of the Commission ought to be enforced." (Printed argument for carriers.)

COURT MAY MODIFY ORDER OF COMMISSION.

It is not necessary in these cases that the court should modify the orders of the Commission, which simply forbid the greater charges for the shorter than the longer hauls, because those orders, as shown in a subsequent chapter of this argument, are adapted to remedy violations of either sections 3 or 4 of the law. It would appear, however, from the language used by the courts, as set forth in the preceding Chapter III of this argument, and particularly that used by this court in the "Alabama Midland Case," namely, that the courts are not "restricted to a consideration merely of the power of the Commission to make *the particular order in question*," that the courts may, if necessary to "do justice in the premises," as commanded by the statute, modify the order of the Commission or make such new or different order as under the law and "the entire body of the evidence" may, in the judgment of the court, be just and proper.

Chapter V.

Power of the Commission to enforce sections 3 and 4 of the law recognized by this court.

In *Interstate Commerce Commission* v. *Cincinnati, New Orleans and Texas Pacific Ry. Co.* (167 U. S., p. 506), this court, while denying power in the Commission to enforce section 1 of the law *by prescribing* rates to be charged by carriers, "maximum, minimum, or absolute," expressly recognizes the authority of the Commission to enforce the provisions of section 3 of the law, forbidding undue preferences in rates as between localities, and to enforce the long and short haul rule of section 4.

In reference to these matters the court, after denying power in the Commission to prescribe rates, says:

"But has the Commission no functions to perform in respect to the matter of rates; no power to make any inquiry in respect thereto? Unquestionably it has, and most important duties in respect to this matter. It is charged with the general duty of inquiring as to the management of the business of railroad companies, and to keep itself informed as to the manner in which the same is conducted, and has the right to compel complete and full information as to the manner in which such carriers are transacting their business. And with

this knowledge it is charged with the duty of seeing that there is *no violation of the long and short haul clause;* that there is no discrimination between individual shippers, and that nothing is done by rebate or any other device to give preference to one as against another; that *no undue preferences are given to one place or places* or individual or class of individuals, but that in all things that equality of right which is the great purpose of the interstate commerce act shall be secured to all shippers."

This court thus expressly holds that, although the Commission is not authorized under section 1 to prescribe rates, it has the power to enforce the provisions of sections 3 and 4 of the law.

Chapter VI.

PLEA OF COMPETITION—ANSWERS THERETO.

As before stated, competition in transportation to the longer distance points, Atlanta or Opelika, is the sole defense set up by the carriers in these cases for the admittedly higher rates to the shorter distance points than to Atlanta or Opelika.

The defendants do not allege any dissimilarity in the circumstances and conditions *relating to the nature and character of the service* of transportation to Atlanta or Opelika on the one hand and the shorter distance points on the other, but plead in justification of their discriminations against the shorter distance points such dissimilarity as existing because of *competition* encountered in transporting traffic to Atlanta and Opelika, which, it is claimed, is not met to *the same extent* in such transportation to the shorter distance points.

The question is, then, whether these cases fall in the category of *extreme or exceptional cases in which alone*, as we will hereinafter show, Congress intended that competition should justify exemption from the rule of the law.

ANSWERS TO PLEA OF COMPETITION.

The main propositions for which we shall contend in answer to the plea of competition are:

First. That the rates to the longer-distance points, Atlanta and Opelika, were established by *agreement* between the carriers, and are not the product of competition.

Secondly. That the rates to the longer-distance competitive points, Atlanta and Opelika, are reasonably high in themselves, and that when rates to competitive points are reasonably high in themselves, whether left so by competition or made so by agreement, there is no justification for higher rates to shorter-distance local points.

Thirdly. That the rates to the shorter-distance points are in themselves excessive or unreasonably high, and that competition can not justify rates which are excessive or otherwise unreasonable in themselves in violation of section 1 of the law.

Fourthly. That even where some discrimination is justified because of the greater force of competition at the locality in favor of which the discrimination is made, the discrimination actually practiced may be *excessive*, and in these cases it is excessive.

Fifthly. That under the decisions of this court competition can justify discrimination only when such discrimination will promote the interests of the public as well as of the carrier, and that the interest of the public at the numerous shorter-distance points discriminated against are not promoted, but prejudiced by the discrimination shown in these cases, and that no *legiti-*

mate interest at Atlanta or Opelika or of the carriers will be prejudiced by doing away with this discrimination.

Sixthly. That the injury or prejudice to the shorter-distance points shown by the proof in these cases to be the effect of the discriminations practiced against them in favor of Atlanta or Opelika brings these cases within the evil which the act to regulate commerce was designed to remedy, and that competition, no matter how forceful, should not be held to nullify the law itself; in other words, *should not be held to justify the very wrongs which the law was enacted to remedy.*

Seventhly. That inasmuch as the orders of the Commission are simply that the carriers desist from charging higher rates to the shorter-distance points than to Atlanta or Opelika, they may be complied with, if the carriers so elect, by giving the shorter-distance points rates as high as those to Atlanta or Opelika, thus ignoring the natural advantage of the former in being the shorter-distance points, and that this will be a reasonable allowance for any possible dissimilarity of conditions resulting from the greater force of competition, if any, at Atlanta or Opelika than at the shorter-distance points.

Chapter VII.

THE PLEA OF COMPETITION.

CASES IN WHICH AND EXTENT TO WHICH COMPETITION MAY JUSTIFY EXEMPTION FROM THE RESTRAINTS OF SECTIONS 3 AND 4 OF THE LAW.

COMPETITION WHICH AFFECTS RATES NOT CONCLUSIVE.

OTHER MATTERS BESIDES COMPETITION TO BE CONSIDERED.

At the outset it is material to inquire in what cases and to what extent this court has held competition may justify discrimination.

Section 4 of the interstate-commerce law forbids the greater charge for the shorter than the longer haul only when the circumstances and conditions attending the transportation are "*substantially similar.*" *Section 3* forbids preferences between localities when they are *undue or unreasonable*, and this court holds that they are undue or unreasonable when the transportation is conducted under "*substantially similar circumstances and conditions.*"

The question, then, in these cases, under sections 3 and 4, is whether the circumstances and conditions

relating to the transportation to the shorter and longer distance points, respectively, are "*substantially similar.*" If they are substantially similar, then the discriminations against the shorter-distance points are unjust and unlawful.

In the *Alabama Midland Case* (168 U. S., 164), it is true this court held that competition is "one of the most obvious and effective circumstances that make the conditions under which a long and short haul is performed substantially dissimilar," and that competition may, therefore, justify preferences under section 3 of the law, and the greater charge for the shorter than the longer haul under section 4.

The court then, however, takes particular pains to quality or limit this proposition as follows:

"In order further to guard against any misapprehension of the scope of our decision, it may be well to observe that we do not hold that *the mere fact of competition*, no matter what its character or *extent*, necessarily relieves the carrier from the restraints of the third and fourth sections, but only that these sections are not so stringent and imperative as to exclude in all cases the matter of competition from consideration in determining the question of 'undue or unreasonable preference or advantage,' or what are 'substantially similar circumstances and conditions.' The competition *may* in some cases be such as, having due regard to the *interests of the public and of the carrier*, ought justly to have effect upon the rates, and in such cases there is no absolute rule which prevents the Commission or the courts from taking that matter into consideration." (168 U. S., 167.)

"The mere fact of competition" does not, therefore, under this decision take a case from under the law as laid down in the third and fourth sections, but only relieves the carrier from the restraints of those sections when the competition is of such "character and extent that the interests of the public," as well as of the carrier, demand such relief; and the court further holds that whether the competition is of such character and extent that the interests of the public and the carrier justify exemptions from the restraints of the third and fourth sections, is a question of fact to be determined by the testimony in each case and not a question of law.

The above extract from the opinion of this court in the "Alabama Midland case" is quoted and the propositions therein reaffirmed by this court in *Louisville and Nashville Railroad Co. et al.* v. *Behlmer* (175 U. S., 649), and which will hereafter be referred to as the "Behlmer case." The following is the language of this court in that case:

"It follows that whilst the carrier may *take into consideration* the existence of competition as the producing cause of dissimilar circumstances and conditions, his right to do so is governed by the following principles: First, *the absolute command of the statute that all rates shall be just and reasonable* and that no undue discrimination be brought about, though, in the nature of things, this latter consideration may, in many cases, be involved in the determination of whether competition was such as created a substantial dissimilarity of condition; second, that the competition relied upon be *not*

artificial or merely conjectural, but *material and substantial*, thereby operating on the question of traffic and rate making, *the right in every event to be only enjoyed with a due regard to the interest of the public*, after giving full weight to the benefits to be conferred on the place from whence the traffic moved as well as those to be derived by the locality to which it is to be delivered."

Judge Severens, in the opinion of the circuit court delivered by him in the Chattanooga case, in discussing the "Alabama Midland Case," says:

"In the case of the *Interstate Commerce Commission* v. *The Alabama Midland Railway Company* (168 U. S., 144) the Supreme Court, while reaffirming the doctrine that competition between railway carriers might and frequently ought to be considered in adjusting rates under the long and short haul clause, *yet took pains to prevent the inference from its opinion that it should be regarded as a controlling consideration.*" * * *

"Congress must have intended something unusual and peculiar, out of the ordinary course of business, as that which would create a substantial dissimilarity; otherwise the vast bulk of transportation would not be subject to the rule at all." (Record, p. 374.)

That Congress did not intend that competition should in all cases justify the greater charge for the shorter haul under section 4 appears from the fact testified to by all the witnesses, both for the complainant and for the defendants, that, at the time the act to regulate commerce was passed and prior thereto and since, the greater charge for the shorter than the longer haul over

the same line in the same direction, the shorter being included in the longer, only existed in cases of *competition in transportation* to the longer distance point.

It is to be presumed that Congress knew this fact, and having this knowledge, that it did not intend that competition in transportation should be an excuse in all cases, but only in certain extreme cases, where, in the language of the Supreme Court, the interests of the public as well as of the carrier demand it.

To hold otherwise would be placing Congress in the absurd position of laying down a rule and then providing that the rule should not be enforced in the only cases in which violations of the rule were known to exist—in other words, enacting a law and providing at the same time that it should be of no effect.

COMPETITION WHICH AFFECTS RATES NOT CONCLUSIVE.

Counsel for the carriers admits that the "*mere fact of competition*" is not sufficient, but he strenuously contends that under the decision of the Supreme Court in the "Alabama Midland Case," competition which "*affects rates*" is a conclusive ground of exemption from the restraints of sections 3 and 4 of the law.

The Supreme Court, however, does not hold that competition which "affects rates" is *ispo facto* a conclusive defense, and such a construction of its opinion does violence to the language of the court.

The language of the Supreme Court in the "Alabama Midland Case" is that "competition which affects rates is *one* of the matters to be *considered*" (168 U. S., 166); and again, that "competition between rival routes is *one* of the matters which *may* be lawfully *considered* in making rates, and a substantial dissimilarity of circumstances and conditions *may justify* common carriers in charging greater compensation for a shorter than a longer distance over the same line." (168 U. S., 170.)

To hold that a matter may be "*considered*" in the determination of a question is an altogether different thing from holding that it shall conclusively settle that question. To hold that a matter "*may justify*" is a wholly different thing from holding that it *does justify*.

The language of this court, that "competition which affects rates is *one* of the matters to be considered," *ex vi termini* implies that there are others.

OTHER MATTERS TO BE CONSIDERED.

Among other matters to be considered are the questions:

(1) Whether the discrimination practiced is not greater than is warranted by the dissimilarity of conditions resulting from competition; in other words, whether the discrimination practiced is not *excessive*.

(2) Why the force of competition at the locality favored by the discrimination is more controlling than at the locality discriminated against—whether this is the result of the *normal* action of the competitive forces at the two localities, or has been brought about by concert or *agreement* between the carriers.

(3) Whether the "*interests of the public*," as well as of the carrier, will be subserved by the discrimination.

CHAPTER VIII.

FIRST ANSWER TO PLEA OF COMPETITION.

RATES TO SHORTER-DISTANCE POINTS EXCESSIVE.

THE RATES IN QUESTION IN THESE CASES.

Our first proposition is that the rates in question to the shorter-distance points are in themselves excessive or unreasonably high, and that competition can not justify rates in themselves excessive.

It is conceded by counsel for the carriers that competition can not justify rates excessive or otherwise unreasonable in themselves, and, as before stated, it is expressly held by this court in *L. & N. R. R. Co.* v. *Behlmer* (175 U. S., 649) that—

"While the carrier may take into consideration the existence of competition as the producing cause of dissimilar circumstances and conditions, his right to do so is governed by *the absolute command of the statute that all rates shall be just and reasonable.*"

As showing the excessiveness of the rates to the shorter-distance points, attention is called, in the first place, to the rates themselves to the shorter and longer distance points, and to *the excess of the former over the latter.*

RATES IN CASE NO. 70.

The rates in question in Case No. 70 from New York and other Eastern cities to the shorter-distance points, Newnan, Grantville, Hogansville, Lagrange, and West Point, and to the longer-distance point, Opelika, and also to Atlanta, are shown, in cents per hundred pounds, in the table below:

Rates, in cents per 100 pounds, Case No. 752.

	Classes.											
	1	2	3	4	5	6	A	B	C	D	E	H	F
Newnan	131	111	98	83	69	56	....	....	....	....	....	78	....
Grantville	147	128	114	97	80	64	....	....	....	....	....	94	....
Hogansville	151	131	116	100	81	65	....	....	....	....	....	97	....
Lagrange	154	135	118	102	82	66	....	....	....	....	....	99	....
West Point	142	124	110	93	77	62	....	....	....	....	....	88	....
Opelika	114	98	86	73	60	49	36	48	40	39	58	68	78
Atlanta	114	98	86	73	60	49	36	48	40	39	58	68	78

The rates on all the classes, it will be observed, are materially lower to Opelika than to the shorter-distance points named between Opelika and Atlanta. For brevity's sake, the attention of the court is called to the disparity in the rates only on first-class goods. Those rates in 1892 (when the order of the Commission was made) were and are now as follows, in cents per hundred pounds:

To Newnan	131	To Opelika	114
To Grantville	147		
To Hogansville	151		
To Lagrange	154		
To Westpoint	142		

Excess of class 1 rates to intermediate points over Opelika rate, in cents per 100 pounds.

	Cents.
To Newnan	17
To Grantville	33
To Hogansville	37
To Lagrange	40
To Westpoint	28

Excess of length of haul to Opelika over hauls to intermediate points.

	Miles.
Newnan	70
Grantville	58
Hogansville	51
Lagrange	38
Westpoint	22

The minimum carload weight under the Southern freight classification, which applies to the traffic involved in these cases, is 24,000 pounds, and the excess of the rates to Newnan, Grantville, Hogansville, Lagrange, and Westpoint, over the rate to Opelika per minimum carload on the six numbered classes (in which, according to the testimony, the traffic involved is embraced), is as follows:

Excess of minimum carload rate to Newnan, etc., over that rate to Opelika.

	1	2	3	4	5	6
Newnan	$40.80	$31.20	$28.80	$24.00	$21.60	$16.80
Grantville	79.20	67.20	62.40	50.40	45.60	33.60
Hogansville	86.40	79.20	72.00	60.00	50.40	36.00
Lagrange	96.00	86.40	76.80	69.60	52.80	44.80
Westpoint	67.20	62.40	57.60	48.00	40.80	31.20

RATES IN CASE NO. 68.

The rates complained of from New York and other Eastern cities to Greensboro, Madison, Social Circle, Covington, Conyers, and Stone Mountain, and for the

haul through those intermediate points to Atlanta, were in 1892, when the order of the Commission was made, and are now, as shown below:

Rates in cents per 100 pounds, Case No. 751.

	Classes.												
	1	2	3	4	5	6	A	B	C	D	E	H	F
Greensboro	137	118	102	87	69	54	45	59	42½	41	65	83	82½
Madison	143	123	107	89	71	56	47	61	43	42	67	85	84
Social Circle	144	125	109	90	72	57	48	61	43½	42½	68	86	85
Covington	141	122	108	93	76	61	48	60	48	46½	74	88	91
Conyers	138	119	105	90	74	60	47	59	47½	46	72	85	93
Stone Mountain	132	114	101	85	71	58	45	57	46	44½	69	80	90½
Atlanta	114	98	86	73	60	49	36	48	40	39	58	68	78
Augusta	96	81	70	58	47	37	28	42	31½	31	43	54	61

The above rates, it will be seen, are materially lower on all classes to Atlanta than to the shorter distance points indicated between Augusta and Atlanta. For brevity's sake, however, attention is called only to the disparity in these rates on *first-class* goods. Those rates were in 1892, and are now, as follows, in cents per hundred pounds:

To Greensboro	137	Atlanta 114
To Madison	143	
To Social Circle	144	
To Covington	141	
To Conyers	138	
To Stone Mountain	132	

Excess of class 1 rates to intermediate points over Atlanta rate, in cents, per 100 pounds.

	Cents.
To Greensboro	23
To Madison	29
To Social Circle	30
To Covington	27
To Conyers	24
To Stone Mountain	18

Excess of length of haul to Atlanta over hauls to intermediate points.

	Miles.
Greensboro	88
Madison	68
Cocial Circle	52
Covington	41
Conyers	31
Stone Mountain	17

Excess of minimum carload rates to Greensboro, etc., over those to Atlanta.

	1	2	3	4	5	6
Greensboro	$55.20	$48.00	$38.40	$33.60	$21.60	$12.00
Madison	72.00	60.00	50.40	38.40	26.40	16.80
Social Circle	72.00	64.80	55.20	40.80	28.80	19.20
Covington	64.80	57.60	52.80	43.20	31.20	21.60
Conyers	57.60	50.40	45.60	40.80	33.60	24.00
Stone Mountain	43.20	38.40	36.00	28.80	26.40	21.60

RATES IN CASE NO. 69.

The rates complained of in Case No. 69, from Cincinnati to Calhoun, Adairsville, Kingston, Cartersville, Acworth, and Marietta, the shorter-distance points, and Atlanta, the longer-distance point, were in 1892,

when the order of the Commission was made, and are now as follows:

Rates, in cents, per 100 pounds.

	Classes.											
	1	2	3	4	5	6	A	B	C	D	E	H	F
Calhoun	109	95	84	71	59	44	34	40	32	27½	53	57	56
Adairsville	112	98	86	73	60	45	35	41	32½	28	54	59	57
Kingston	115	101	88	75	61	46	36	42	31½	27	55	61	55
Cartersville	118	103	90	76	62	47	37	43	34	29	56	62	59½
Acworth	124	107	94	78	64	49	39	45	35	30	58	64	61
Marietta	127	109	96	79	65	50	38	45	35	30	56	65	62
Atlanta	107	92	81	68	56	46	28	35	28	24	48	53	48

The above rates are materially lower on *all* classes to Atlanta than to the shorter-distance points intermediate between Chattanooga and Atlanta. Attention is called to the disparity in the rates on *first-class* goods as illustrating the extent of the discrimination practiced. Those rates were in 1892 and are now as follows, in cents, per hundred pounds:

To Calhoun	109	To Atlanta 107
To Adairsville	112	
To Kingston	115	
To Cartersville	118	
To Acworth	124	
To Marietta	127	

Excess of class 1 rates to intermediate points over Atlanta, in cents, per 100 pounds.

	Cents.
To Calhoun	2
To Adairsville	5
To Kingston	8
To Cartersville	11
To Acworth	17
To Marietta	20

Excess of length of haul to Atlanta over hauls to intermediate points.

	Miles.
Calhoun	78
Adairsville	69
Kingston	59
Cartersville	48
Acworth	35
Marietta	21

Excess of minimum carload rates to Calhoun, etc., over that rate to Atlanta.

	1	2	3	4	5	6
Calhoun	$4.80	$7.20	$7.20	$7.20	$7.20	.....
Adairsville	12.00	14.40	12.00	12.00	9.60	.....
Kingston	19.20	21.60	16.80	16.80	12.00	.....
Cartersville	26.40	26.40	21.60	19.20	14.40	$2.40
Acworth	40.80	36.00	31.20	24.00	19.20	7.20
Marietta	48.00	40.80	36.00	26.40	21.60	9.60

It will be observed that we have given the excess of the rates to shorter-distance points on *minimum* carloads of 24,000 pounds. *The excess on a larger carload, or average carload, will be much greater.*

Chapter IX.

EXCESSIVENESS OF RATES TO SHORTER DISTANCE POINTS, CONTINUED.

FACTS AND GROUNDS UPON WHICH THE CLAIM OF EXCESSIVENESS IS BASED.

ERROR OF CIRCUIT COURT OF APPEALS IN HOLDING THAT THERE WAS NO EVIDENCE OR FACTS "TENDING TO SHOW" UNREASONABLENESS OR EXCESSIVENESS OF RATES TO SHORTER DISTANCE POINTS.

The circuit court of appeals held, in its opinion in these cases, that—

"The most careful consideration of the testimony brought up in the records in these causes does not disclose any evidence that was offered by the appellant" (Commission) "in the circuit court *tending to show* that the rates, separately considered, to the respective points are not reasonable and just."

(Record in case No. 69, bottom p. 272 and top p. 273; eleventh assignment of error.)

Among other facts which appear in the records in these cases "*tending to show*" the excessiveness of the rates, "separately" or in themselves, to the shorter distance points, respectively, it is sufficient to mention that, on cross-examination, witnesses for the carriers

testified that the rates to the longer distance points yielded the carriers a "*reasonable*" remuneration in excess of the cost of the service for the longer hauls to those points; from which the legitimate *prima facie* presumption is that the materially higher rates to the shorter distance points were excessive. (See testimony in Chapter X, *infra.*)

Also, the further fact that tables were introduced in evidence in the circuit court showing that the rates per ton per mile under the rates to the shorter distance points *were many times higher* than the average receipts per ton per mile, and the estimated cost of carrying 1 ton 1 mile on traffic in general, on the roads of the principal defendants and on roads generally throughout the United States. (See testimony in Chapter XV, *infra.*)

These two facts and many others disclosed by the record at least "*tended to show*" the excessiveness of the rates to the shorter-distance points.

SUMMARY OF GROUNDS UPON WHICH IT WAS CONTENDED IN THE COURTS BELOW, AND IS NOW CLAIMED IN THIS COURT, THAT THE RATES TO THE SHORTER DISTANCE POINTS ARE EXCESSIVE.

First. Materially lower rates are and have been for a long series of years charged to the longer distance points.

Second. These materially lower rates to the longer distance points must be *presumed* to be reasonably remunerative to the carrier.

Third. These materially lower rates to the longer-distance points are *proven* by positive testimony of railroad officials to be reasonably remunerative to the carriers.

Fourth. The rates to the longer distance points are *proven* to have been established by *agreement*, and must, therefore, be presumed to be reasonably remunerative to the carrier.

Fifth. The rates per ton per mile yielded by the rates to the shorter distance points are many times higher than the average receipts per ton per mile and estimated cost of carrying one ton one mile on traffic in general on the roads of the principal defendants and on roads generally throughout the United States.

Sixth. The hauls to the shorter distance points are through hauls, but the rates are *combination of through and local rates.*

These and germane propositions will be discussed at length in subsequent chapters of this argument.

Chapter X.

EXCESSIVENESS OF RATES TO SHORTER DISTANCE POINTS, CONTINUED.

EXCESSIVENESS INFERRED FROM FACT THAT MATERIALLY LOWER RATES ARE CHARGED, AND HAVE BEEN CHARGED FOR A LONG SERIES OF YEARS, TO THE LONGER DISTANCE POINTS, AND THOSE LOWER RATES ARE PRESUMPTIVELY REASONABLY REMUNERATIVE FOR THE LONGER HAULS.

THE LOWER RATES FOR THE LONGER HAULS ARE ALSO PROVEN BY TESTIMONY OF RAILROAD OFFICIALS TO BE REASONABLY REMUMERATIVE FOR THOSE HAULS.

(*a*) The excessiveness in themselves of the rates to the shorter distance points may, in the *first place*, be *inferred* from the great disparity between those rates and the rates to the longer distance points.

It would appear, presumptively at least, that the rates to the shorter distance points are unreasonably high in themselves, because traffic is (and *has been for a long series of years*) carried through those points and a *materially* longer distance on to the longer distance points at *materially* lower rates.

In the *Chattanooga Case* (85 Fed. Rep., 114), Judge Severens says on this point:

"The charges accepted for the longer haul may be referred to for the purpose of considering the reasonableness of the charges made for the shorter haul. *Such comparisons are applied to every other kind of business*, and the fact that there may be competition in such business would not be a controlling consideration, for the presumption would always be that the compensation charged for the service or thing is sufficient to be reasonable."

The *prima facie* presumption is that the materially lower rates for the materially longer hauls to Opelika and Atlanta yield the carrier a reasonable remuneration over and above the expense of carriage to those points.

This presumption rests upon the same principle or belongs to the same class of presumptions as the presumption of *sanity*. An individual who would render services for a sum not reasonably remunerative—and that, too, not "incidentally, but for a long series of years"—would be held to be an incompetent business man, if not *non compos mentis*. There is no reason why the same rule should not be applied to carriers.

If, as we are bound to presume, the materially lower rates for the materially longer hauls to Opelika and Atlanta yield the carriers a reasonable remuneration in excess of the cost of service, then the *same* rates to the shorter distance points would yield a remuneration

in excess of such reasonable remuneration, and rates to the shorter distance points which are *materially higher* than rates to Opelika and Atlanta would yield a still greater remuneration in excess of such reasonable remuneration, and are presumptively excessive.

If, on the other hand, as all the witnesses for the carriers testify, the rates to the shorter distance points yield only a reasonable compensation in excess of the cost of the service of transportation to those points, and are not excessive, then the lower rates to Opelika and Atlanta yield not only nothing for the additional hauls to those points, but *less than nothing.*

In the *Chattanooga Case* (85 Fed. Rep., 115), Judge Severens says:

"If the through rates (for the longer haul through Chattanooga) to Nashville afford a fair profit to the carriers, there is substantial ground for contending that the *same charge* for carrying freight from the East to Chattanooga would afford a reasonable profit and would therefore be a reasonable charge."

(*b*) *That the materially lower rates for the materially longer hauls to Opelika and Atlanta are reasonably remunerative, not left to presumption; positive proof to that effect.*

We are not left to *presume*, however, that the materially lower rates for the materially longer hauls to

Opelika and Atlanta yield the carriers a reasonable remuneration over and above the expense of carriage. We have the positive testimony of railroad officials, witnesses for the defendants, that the rates to Opelika and to Atlanta are reasonable *in themselves* and yield the carriers a reasonable compensation over and above the cost of carriage.

Y. Van den Berg, traffic manager of the Louisville and Nashville Railroad Company, who has been connected with the freight-traffic business of the United States since 1880, testifies as follows on cross examination:

"Cross-question 34. Are the rates from New York and other Northeastern cities to Opelika reasonable *in and of themselves*, considered solely from the standpoint of the carrier? That is, do they pay the cost of service of carriage and yield the carrier a *reasonable* compensation over and above that cost?"

"Answer. *I think they do.*"

(Testimony of Y. Van den Berg, Record, in Case 70, p. 87.)

George R. Knox, general freight agent of the Nashville, Chattanooga and St. Louis Railway, testifies as follows on cross-examination:

"Cross-question 17. Are the lower rates from New York and other Northeastern cities for the longer hauls through those intermediate points (Newnan, Grantville, Hogansville, Lagrange, and West Point) to Opelika *just and reasonable in and of themselves?*"

"Answer. I think so."

"Cross-question 20. Is a rate in your opinion reasonable which does not yield a carrier a *proper* remuneration over and above the cost of the service of carriage?"

"Answer. No; I do not think it is."

(See testimony of G. R. Knox, Record in Case 70, p. 129.)

G. P. Biles, general freight agent of the Cincinnati, New Orleans and Texas Pacific Railway Company, testifies as follows on cross-examination:

"Cross-question 17. You have testified that in your opinion the rates from New York and other Eastern cities to Newnan, Grantville, Hogansville, Lagrange, and West Point, are just and reasonable *in and of themselves*. Is it also your opinion that the lower rates for the longer haul through those points to Opelika are just and reasonable *in and of themselves?*"

"Answer. I think so."

"Cross-question 20. Is a rate in your opinion reasonable *in and of itself* which does not yield the carrier a *proper* remuneration over and above the cost of the service of carriage?"

"Answer. I should say not."

(See testimony of G. P. Biles, Record in Case 70, p. 147.)

R. E. Lutz, freight-traffic manager of the Atlanta and West Point Railroad and the Western Railway of Alabama, on cross-examination, testified as follows:

"Cross-question 29. You stated in your direct examination that the rates over the line involved in this case from New York and other Northeastern cities to Newnan, Grantville, Hogansville, Lagrange, and West Point were just and reasonable. Is that your opinion

also as to the rate from New York and other Northeastern cities for the longer haul through those intermediate points to Opelika?"

"Answer. Yes, sir."

"Cross-question 31. Is a rate reasonable *in and of itself* which does not yield the carrier a *proper* remuneration over and above the cost of the service of carriage?"

"Answer. No; I would not consider it a reasonable rate if it did not yield the carrier *sufficient revenue* over and above cost of transportation."

(Testimony of R. E. Lutz, Record in Case 70, p. 121.)

To the same effect is the testimony of witnesses in relation to the rates from Cincinnati and from New York and other Northeastern cities to Atlanta.

Chapter XI.

MEANING OF WORDS "REASONABLE COMPENSATION ABOVE COST OF SERVICE," RATES "REASONABLE IN AND OF THEMSELVES," "PROPER REMUNERATION OVER AND ABOVE THE COST OF SERVICE," "SUFFICIENT REVENUE OVER AND ABOVE THE COST OF SERVICE," USED IN TESTIMONY OF WITNESSES FOR ROADS SET FORTH IN PRECEDING CHAPTER.

(*a*) It will be observed, as set forth in the preceding Chapter X, of this argument, that the witness Van den Berg testifies that the rates to the *longer* distance points yield "a *reasonable compensation* over and above the cost of service of carriage;" that the witness George R. Knox testifies that the rates to the shorter distance points are "*just and reasonable in and of themselves*," and that a rate is not reasonable which does not yield the carrier "a *proper remuneration* over and above the cost of service of carriage;" that the witness G. P. Biles testifies that those rates are "*just and reasonable in and of themselves*;" and that a rate is not reasonable "*in and of itself*" which does not yield the carrier "a *proper remuneration* over and above the cost of service of carriage;" that the witness R. E. Lutz testifies that those rates are "*just*

and reasonable," and that a rate is not "*reasonable in and of itself*" which does not yield the carrier "SUFFICIENT REVENUE over and above the cost of transportation;" and that the witness Joseph M. Brown testifies that those rates are reasonable "*in and of themselves*," and that a rate is not reasonable "in and of itself" which does not yield the carrier "a *proper remuneration* over and above the cost of service of carriage."

Counsel for carriers insists that these witnesses did not take fixed charges into account. *This is pure assumption.*

He calls attention to the fact that there are cost of movement (equivalent to cost of service) and fixed charges, and from that fact draws the inference that the witnesses did not include fixed charges. This is a clear case of *non sequitur.*

At the hearing in the circuit court it was suggested by the court that inasmuch as counsel differed as to the meaning of the language of these witnesses that the court would like to have submitted additional proof on this subject, or words to that effect. The language being unambiguous and the witnesses being defendants' witnesses, it did not devolve upon counsel for the Commission to act upon this suggestion.

Counsel for the carriers, upon whom it did devolve to show that the language of his own witnesses had a different meaning from what it naturally imports, did not act upon this suggestion of the court.

The *natural* meaning of this language is plain, and *we stand upon that.*

How can a rate be said to yield a "*sufficient* revenue over and above the cost of transportation" unless it yields "sufficient revenue" (testimony of R. E. Lutz) to pay fixed charges as well as dividends?

How can a rate be said to be reasonable "*in and of itself*" unless it yields revenue over and above the cost of service of carriage sufficient to meet fixed charges and dividends both?

How can rates be said to yield a "*reasonable* or *proper remuneration*" over the cost of the service of carriage unless that remuneration is sufficient to meet dividends and fixed charges both?

How can a rate be said to yield a "*reasonable compensation*" over and above the cost of service of carriage unless that compensation is sufficient to meet both fixed charges and dividends?

Rates which do not yield sufficient revenue in excess of the cost of service to meet both fixed charges and

proper dividends can not be said to be either "*reasonable in and of themselves*" or to yield a "*proper remuneration*" over and above the cost of the service of carriage, or to yield "*a reasonable compensation*" over and above that cost, or to yield "*sufficient revenue*" over and above that cost.

Such rates would be *unreasonably low* "in and of themselves," and would not yield sufficient revenue over and above the cost of service of transportation.

How can rates be said to be *remunerative* or *compensatory* in any sense which do not pay fixed charges as well as reasonable dividends?

But counsel for the carriers contends that this testimony of his own *expert* witnesses did not take into account fixed charges. He might as well contend that it did not take into account *reasonable dividends, because his witnesses made no mention of dividends.*

This seems to be an afterthought with counsel for the roads. The testimony was brought out on *cross-examination* by counsel for the commissioner. If the witnesses did not take fixed charges into account, why did not counsel for the carriers make this appear *by redirect examination of his witnesses?*

The idea that such a construction could be put upon the language of the witnesses for the roads never en-

tered the mind of counsel for the commission, and when he propounded the cross-questions which brought forth this testimony he meant by the words "reasonable or proper remuneration" a remuneration which would meet both fixed charges and reasonable dividends.

We stand upon the *natural* and *obvious* meaning of the language of witnesses for the carriers. If that language has a *technical* meaning when applied to railroad rates, which it does not have in ordinary use, then *the burden was upon the defendants to make that fact appear.*

It is also to be noted that the words "in and of themselves," when applied to reasonableness of rates, exclude the idea that the rates have been made lower than they otherwise should be by *competition* or anything else.

Chapter XII.

THE OTHER HORN OF THE DILEMMA.

IF RATES TO LONGER DISTANCE POINTS ARE NOT REASONABLY REMUNERATIVE, THEN PART OF THE BURDEN WHICH SHOULD BE BORNE BY THE TRAFFIC TO THOSE POINTS IS TAXED UPON TRAFFIC TO SHORTER DISTANCE POINTS.

Counsel for the carriers admitted at the hearing in the court below that if his witnesses meant that the rates in question to the longer distance points yield a reasonable remuneration in excess both of the cost of service and fixed charges, the position of counsel for the Commission was sustained. *His contention, then, is that those rates do not yield compensation in excess of the cost of service sufficient to meet fixed charges and reasonable dividends.* If that be so, then the rates to the longer distance points are *unreasonably low*, and the burden of paying fixed charges which should be borne proportionately by the traffic to the longer distance points or an undue proportion of that burden is placed on traffic to the shorter distance points. I quote below

what is said by Judge Severens in the "Chattanooga case" on this subject:

"If carriers engage in a competitive struggle for business at a place where they meet and underbid each other to a point which is not in itself remunerative, they can not turn back on the line, and taking advantage of the conditions existing at other localities arising either from the fact that there is no opportunity for competition or from the fact that by concert of the carriers there is none, charge such rates for the shorter haul as shall make good their lack of profits in the competitive business. Such a course can not be sanctioned without 'tearing up by the roots' the whole scheme of the commerce act."

We contend that competition can justify neither unreasonably high rates to noncompetitive points nor unreasonably low rates to competitive points, *the latter rates resulting in a deficiency which must be taxed upon traffic to noncompetitive points.*

The principle underlying this proposition is sustained by this court in *Smythe* v. *Ames*, known as the "Nebraska maximum rate case," reported in 169 U. S., page 541.

In that case the appellee contended that the inadequacy of the local or domestic rates in question was made up by the rates on interstate traffic, and that this

justified the inadequacy of the domestic or local rates. On this point this court says:

"If we do not misapprehend counsel, their argument leads to the conclusion that the State of Nebraska could legally require local freight business to be conducted even at an actual loss, if the company earned on its interstate business enough to give it just compensation in respect to its entire line and all its business, interstate and domestic. We can not concur in this view. In our judgment it must be held that the reasonableness or unreasonableness of rates prescribed by a State for the transportation of persons and property wholly within its limits must be determined without reference to the interstate business done by the carrier or to the profits derived by it. The State can not justify unreasonably low rates for domestic transportation, considered alone, upon the ground that the carrier is earning large profits on its interstate business, over which, so far as rates are concerned, the State has no control. *Nor can the carrier justify unreasonably high rates on domestic business upon the ground that it will be able only in that way to meet losses on its interstate business.* So far as rates of transportation are concerned, *domestic business should not be made to bear the losses on interstate business, nor the latter the losses of domestic business.*" (169 U. S., 541.)

THE TWO HORNS OF THE DILEMMA.

There is presented to counsel for the carriers *the two horns of a dilemma.* If rates to the longer-distance points do not yield a compensation in excess of the cost of service of transportation sufficient to pay their proper proportion of both fixed charges and reasonable

dividends, and are, therefore, unreasonably low, and the rates to the shorter-distance points are reasonably high, then that in itself constitutes an unjust preference in favor of the longer-distance points. If, on the other hand, the lower rates to the longer-distance points yield a remuneration in excess of the cost of service sufficient to meet their proper proportion of both fixed charges and reasonable dividends, then the higher rates for the materially shorter hauls to the shorter-distance points are excessive.

Chapter XIII.

COST OF SERVICE AN ELEMENT TO BE CONSIDERED IN DETERMINING REASONABLENESS OF RATES—DISTANCE ADDS TO THE COST OF SERVICE, AND ALSO TO THE FIXED CHARGES—COST OF SERVICE TO SHORTER DISTANCE POINTS LESS THAN TO OPELIKA OR ATLANTA ON ACCOUNT OF LONGER HAULS TO LATTER POINTS.

The propositions would seem to be self-evident, (1) that the cost of service is an element to be considered in determining the reasonableness of rates; (2) that the cost of service depends largely, if not principally, on distance or the length of the haul; (3) that the distance to Opelika or Atlanta being materially greater than to the shorter distance points the cost of the service of transportation to Opelika or Atlanta must be greater than to the shorter distance points, and (4) that rates to the shorter distance points must be excessive which are materially higher than rates which pay a *proper* remuneration in excess of the cost of service for the longer hauls through those points to Opelika or Atlanta.

The first three of these propositions were admitted by most, if not all, the railroad officials examined in behalf of the defendants, and also the proposition that

the greater the length of a road the greater would be the cost of its construction, and hence the greater the amount of what are known as "fixed charges," such as interest on capital invested, taxes, etc.

All these witnesses admit that, other things being equal, the consumption of time is greater the greater the length of the haul;

That, other things being equal, the consumption of fuel is greater the greater the length of the haul;

That, other things being equal, the wear and tear on locomotives, cars, track, roadbed, etc., is greater the greater the length of the haul;

That, other things being equal, the cost of keeping a road in repair is greater the greater the length of the road;

That, other things being equal, it requires more locomotives and cars and more crews for the running of trains on a long road than on a short one;

That, other things being equal, distance adds to the cost of building roads, and therefore the fixed charges, such as interest on capital invested, taxes, etc., are greater the greater the length of the road; and

That the value of the service to the shipper, as a general rule, is greater the greater the length of the haul.

It is thus seen that not only the expense of the actual service of transportation, but also the fixed charges, such as interest on investment, etc., are directly dependent on distance. These expenses and charges are necessarily first to be determined in making a reasonable rate. Distance, therefore, is the most important and controlling element in rate making.

This fact is universally recognized and constantly acted upon by all carriers. When rates are divided between carriers composing a through line, the proportion of each carrier is determined by mileage, and you can not find a tariff of rates which does not, as an almost invariable rule, provide higher charges as the length of the haul increases from station to station.

IMPORTANCE OF DISTANCE AS A FACTOR IN RATE-MAKING RECOGNIZED BY CONGRESS.

By forbidding in section 4 of the law the greater charge for the shorter than the longer DISTANCE, Congress recognizes and emphasizes the importance of *distance* as a factor in rate-making.

Chapter XIV.

THE RATES TO THE LONGER DISTANCE POINTS NOT FIXED BY COMPETITION BUT BY AGREEMENT BETWEEN THE CARRIERS.

WHERE RATES ARE ESTABLISHED BY AGREEMENT BETWEEN DIFFERENT LINES OF CARRIERS THEY WILL BE REASONABLY HIGH. (171 U. S., 505.)

THE VERY OBJECT OF THE AGREEMENT IS TO GET RID OF LOW RATES BROUGHT ABOUT BY COMPETITION AND ESTABLISH AND MAINTAIN REASONABLE RATES.

WHEN RATES TO COMPETITIVE POINTS ARE REASONABLY HIGH, WHETHER LEFT SO BY COMPETITION OR MADE SO BY AGREEMENT, THERE IS NO JUSTIFICATION FOR HIGHER RATES TO SHORTER DISTANCE POINTS.

THE GROUND UPON WHICH THE RIGHT TO CHARGE HIGHER RATES TO SHORTER DISTANCE POINTS IS BASED IS THAT COMPETITION HAS FORCED CARRIERS TO CHARGE UNREASONABLY LOW RATES TO THE LONGER-DISTANCE POINTS.

TRUE INWARDNESS OF THE SITUATION.

The fact is conceded and also established by the proof in these cases, that the *same rates* are charged and

maintained by all the alleged competing lines to the longer distance points, and that these rates were originally FIXED BY AGREEMENT between the carriers composing those lines as members of the Southern Railway and Steamship Association.

Testimony of Y. Van den Berg, cross-questions 34-37, record in case 69, p. 118.

Testimony of Y. Van den Berg, cross-questions 57-59, record in case 70, p. 89.

Testimony of Y. Van den Berg, cross-questions 43-45, record in case 68, p. 70.

(The testimony of all the other railroad officials in the three cases on this point is to the same effect.)

RATES FIXED BY AGREEMENT HIGHER THAN RATES THE PRODUCT OF COMPETITION.

It is well settled that where *previously competing* carriers come together and agree upon the rates to be charged by them between certain termini, those rates will be higher than rates which are the result of active competition. This proposition is one of the bases of the decision of this court in the *Joint Traffic Association Case*. (171 U. S., 505.)

In that case, in speaking of the agreement in the *Trans-Missouri Case* (166 U. S., 209) and of the agreement in the *Joint Traffic Association Case* this court says:

"The natural and direct effect of the two agreements is the same, viz, *to maintain rates at a higher level than would otherwise prevail.*" (171 U. S., 565.)

And again:

"The agreement" (Joint Traffic Association agreement) "*affects interstate commerce by destroying competition and by maintaining rates above what competition might produce.*" (171 U. S., 569.)

And again, the court speaks of the Joint Traffic Association agreement as one made—

"For the purpose of stifling competition among themselves" (the competing lines), "and of thus keeping their rates and charges higher *than they might otherwise be under the laws of competition.*" (171 U. S., 571.)

The agreement fixing rates in these cases was brought about by the injurious effects of unhealthy competition, but the rates themselves, established by that agreement are not the product of competition—per contra, they are the product of an agreement, the object of which was to do away with competition.

Witnesses for the carriers in testifying that the rates, although established by agreement, are the result of competition, *fail to distinguish between the agreement and the rates established by it.* The agreement is the result of competition, but the rates are the result of the agreement to do away with competition, and hence are not the product of competition.

As stated above, the agreement fixing rates in these cases was between the carriers as members of the Southern Railway and Steamship Association. J. M. Culp, traffic manager of the Southern Railway, and a witness for the carriers in all these cases, testified that this association "*was formed as a means of preventing the roads from destroying each other by competition.*" The following is an extract from his testimony on this point:

"Cross-question 50. Did not competition cause the roads to form the association" (Southern Railway and Steamship Association)?

"Answer. *The association was formed as a means of preventing the roads destroying each other by competition.*"

(Record in case 70, p. 75.)

CONTENTION OF COUNSEL FOR CARRIERS BEFORE COURT BELOW.

Counsel for carriers in his oral argument before the court below drew upon his "*inner consciousness*"—there being no testimony to sustain his statement—and told the court that when traffic managers come together to agree upon rates they practically enter into competition, although their object in coming together is to get rid of competition, and that they underbid each other and the lowest rate will be adopted. This is contrary to reason and common sense.

The very object for which they come together is the establishment of rates *reasonably high* to take the place of *rates unreasonably low*, brought about by competition.

When they so come together to establish reasonably high rates *there is nothing to prevent their doing so.*

They can have no motive for underbidding each other, as counsel for the carriers alleges they would naturally do. THIS IS APPARENT FROM THE FACT THAT WHEN THE RATES BY ALL THE COMPETING LINES ARE MADE *the same* BY AGREEMENT, EACH LINE WILL GET AS LARGE A PROPORTION OF THE ENTIRE TRAFFIC TRANSPORTED UNDER THE RATES, WHETHER THEY BE HIGH OR LOW. THERE IS, THEREFORE, NO MOTIVE FOR UNDERBIDDING. THE MOTIVE IS THE OTHER WAY.

According to the "inner consciousness" of counsel for the carriers, they will, when they come together to agree upon rates reasonably high, from force of habit enter into competition by endeavoring to underbid each other—*and this, too, when there can be no motive for so doing, and when underbidding will defeat the object of their meeting.*

This view of counsel for carriers places traffic managers in a very unenviable light. If it be true, their

conduct is wholly devoid of reason and common sense, and they are utterly incompetent to transact the business committed to their hands.

ADMISSION BY COUNSEL FOR THE CARRIERS.

Counsel for the carriers virtually admits the correctness of our views, as follows:

"As held by the Supreme Court, the object of traffic association agreements was to restrain within *reasonable limits* the ruinous competition which existed at longer-distance points.

"The very fact that such agreements were made is the best evidence that competition existed at the longer-distance points, and as the object of such agreements was to restrict that competition and *thereby increase the longer-distance rates.*" * * *

(Bottom p. 118, printed argument of counsel for carriers in court below.)

It will be observed that counsel for the carriers admits that the object of such agreements is "to restrain within *reasonable limits* the ruinous competition which existed at the longer-distance points." *How can the agreement restrain the competition within "reasonable limits" unless the agreement resulted in rates reasonably high?* He also admits that the result of the agreement is to "*increase*" the longer-distance rates.

The long maintenance of these rates shows they are not affected by competition.

The proof is that the rates now in force to the longer distance points have been in force for a long period of time, *fifteen years or more.*

This fact shows that they are *maintained by agreement*, and are not subject to the reductions or fluctuations which would result if competition had free play. Where rates are subject to competition they will naturally fluctuate.

When rates to competitive points are reasonably high, whether left so by competition or made so by agreement, there is no justification for higher rates to shorter distance points.

The ground upon which the right to charge higher rates to shorter distance points is based, is that competition has forced the carriers to charge unreasonably low rates, or rates lower than they might otherwise charge, to the longer distance points.

Competition, the only effect of which is to hold rates down to a reasonable level, can not be invoked in justification of higher rates to shorter distance points. Such competition has only left the rates such as the law requires them to be, and in contemplation of law does not warrant discrimination.

TRUE INWARDNESS OF THE SITUATION.

The fact appears to be that at competitive points reached by two or more lines of transportation, the

carriers, in order to avoid rate wars resulting in unreasonably low rates, are forced to come together and by agreement establish rates reasonably high.

Per contra, at the shorter-distance points reached by only one road, the carriers are under no such compulsion to charge reasonable rates.

At these points, therefore, they are at liberty to charge *all the traffic will bear*. Hence all their witnesses testified that the rates to the shorter-distance points are reasonable, *because traffic "moves" under those rates to those points*. They all testified that a rate is, in their opinion, reasonable *under which the traffic will "move."* (See testimony set forth in chapter infra.)

This is equivalent to saying that any rate is reasonable which is not *prohibitory*. A rate under which traffic will not move is prohibitory and "kills the goose that lays the golden egg."

There is a wide margin, manifestly, between a prohibitory rate and a reasonable rate. For example, *traffic may be worth, say, $100. The rate charged may be $90. In order to secure the $10 difference between the rate and the market value of the traffic the shipper will ship under the $90 rate, although a reasonable rate might be only $50, or less.*

The alternative presented to the shipper is *something or nothing*, "*a half loaf or no loaf at all.*" Therefore the traffic will move under excessive rates.

The whole situation, in a nut shell, then, is, that at the basing or competitive points carriers are compelled to charge reasonable and not excessive rates, and at the shorter-distance points reached by only one road they are under no such compulsion, and charge all that the traffic will bear, or under which it will "move"; in other words, rates which are simply not prohibitory.

Position of circuit court of appeals on this point.

In answer to this the circuit court of appeals says:

"It is argued by counsel for the appellant" (the Commission) "that by this agreement as to the rates the carriers have contracted to not compete. But it is not shown or reasonably suggested on what ground or for what consideration the competing carriers consented to accept the lower rates to these longer-distance points than they charged to the shorter-distance points, for they could just as well have agreed and contracted to charge as great or greater rates to the longer than to the shorter distance points." (Record in case 69, middle p. 272.)

There are many reasons *other than competition* why carriers when they come together to establish rates to these longer-distance competitive points will be restrained or held down to reasonable charges.

These longer-distance competitive points are known as "trade centers," or "basing points;" they are very much larger and more powerful than noncompetitive shorter-distance points *on one road alone*. If all the lines leading to a trade center or basing point should come together and agree upon *excessive* rates, it would result to the injury of the roads in diverting traffic from that trade center or in the building of other roads or other competing lines.

Moreover, the holders of the great financial interests centered in these trade centers have large interests also in the lines of transportation serving them. The presidents, directors, and stockholders of the carriers composing these lines are directly concerned in the prosperity of these trade centers. All these and many other considerations will cause traffic managers when they come together to agree upon rates to these trade centers, *to not transcend the limits of reasonableness.*

The traffic manager of a single road, in fixing rates to a local noncompetitive point on that road reached by no other road, is under no such restraint. Such point is at his mercy and he may charge "all the traffic will bear."

Chapter XV.

EXCESSIVENESS OF SHORTER-DISTANCE RATES, CONTINUED.

EXCESSIVENESS SHOWN BY COMPARISON OF RATES PER TON PER MILE TO SHORTER-DISTANCE POINTS WITH AVERAGE RECEIPTS PER TON PER MILE AND ESTIMATED COST OF CARRYING ONE TON ONE MILE ON TRAFFIC IN GENERAL ON DIFFERENT LINES OF CARRIERS THROUGHOUT THE COUNTRY.

CONFLICTING OPINIONS OF COUNSEL FOR THE CARRIERS AND HIS WITNESSES AS TO THE VALUE OF THIS DATA.

The unreasonable or excessive character of the rates to the shorter-distance points may be inferred, not only from the fact that materially lower rates for the longer hauls through those points to Opelika and Atlanta are reasonable and yield the carriers a *proper* remuneration in excess of the cost of carriage, but it also becomes apparent from a comparison of the rates per ton per mile to the shorter-distance points with the *average receipts per ton per mile* and *estimated cost* of carrying a ton a mile on lines of the defendants and on railroads all over the country.

The rates per ton per mile from New York to the shorter-distance points on the six numbered classes under the rates in question in Case *No. 68* and Case *No. 70*, and also the rates per ton per mile from Cincinnati to the shorter-distance points under the rates in question in Case *No. 69*, and the averages of those rates per ton per mile are shown in the following tables:

CASE No. 70.

Rates per ton per mile from New York.

Classes.	To Newnan.	To Grantville.	To Hogansville.	To Lagrange.	To West Point.
	Cents.	*Cents.*	*Cents.*	*Cents.*	*Cents.*
1	4.38	4.82	4.90	4.89	4.40
2	3.70	4.20	4.25	4.29	3.84
3	3.28	3.74	3.76	3.75	3.41
4	2.78	3.18	3.24	3.24	2.88
5	2.31	2.62	2.62	2.60	2.38
6	1.87	2.10	2.11	2.09	1.92

	Cents.
Average to Newnan	3.05
Average to Grantville	3.44
Average to Hogansville	3.48
Average to Lagrange	3.47
Average to West Point	3.13

CASE NO. 68.

Rates per ton per mile from New York.

Classes.	To Greensboro.	To Madison.	To Social Circle.	To Covington.	To Conyers.	To Stone Mountain.
	Cents.	*Cents.*	*Cents.*	*Cents.*	*Cents.*	*Cents.*
1	5.82	5.83	5.69	5.45	5.23	4.87
2	5.02	5.02	4.94	4.71	4.51	4.20
3	4.34	4.36	4.30	4.17	3.98	3.72
4	3.70	3.63	3.55	3.59	3.41	3.13
5	2.93	2.89	2.82	2.94	2.80	2.61
6	2.29	2.28	2.25	2.35	2.27	2.14

	Cents.
Average to Greensboro	4.01
Average to Madison	4.00
Average to Social Circle	3.92
Average to Covington	3.86
Average to Conyers	3.70
Average to Stone Mountain	3.44

CASE NO. 69.

Rates per ton per mile from Cincinnati.

Classes.	To Calhoun.	To Adairsville.	To Kingston.	To Cartersville.	To Acworth.	To Marietta.
	Cents.	*Cents.*	*Cents.*	*Cents.*	*Cents.*	*Cents.*
1	5.47	5.50	5.50	5.51	5.62	5.57
2	4.77	4.81	4.83	4.81	4.85	4.79
3	4.22	4.22	4.21	2.20	4.26	4.23
4	3.56	3.58	3.58	3.55	3.53	3.46
5	2.96	2.94	2.91	2.89	2.90	2.86
6	2.21	2.21	2.20	2.19	2.22	2.19

	Cents.
Average to Calhoun	3.86
Average to Adairsville	3.87
Average to Kingston	3.87
Average to Cartersville	3.85
Average to Acworth	3.89
Average to Marietta	3.84

The *average receipts per ton per mile* and the *estimated cost* of carrying 1 ton 1 mile for the year 1892 (when the order of the Commission was made) on roads in different sections of the country (embracing most of the defendants in these cases), reported by these roads to the Interstate Commerce Commission, are shown in the table below:

Name of road.	1892. Average receipts per ton per mile.	1892. Estimated cost of carrying 1 ton 1 mile.
I.	*Cents.*	*Cents.*
1. Louisville and Nashville R. R	0.948	0.621
2. Nashville, Chattanooga and St. Louis Rwy	1.035	.599
3. Cincinnati, New Orleans and Texas Pacific Rwy	.779	.571
II.		
1. Pennsylvania R. R	.647	.448
2. New York, New Haven and Hartford R. R	1.747	1.425
3. Pittsburg, Cincinnati, Chicago and St. Louis Rwy	.706	.551
4. Fitchburg R. R	.925	.712
5. West Shore R. R.[1]		
6. Lake Shore and Michigan Southern Rwy	.602	.416
7. Cleveland, Cincinnati, Chicago and St. Louis Rwy	.710	.481
8. New York, Chicago and St. Louis R. R	.537	.438
9. New York Central and Hudson River R. R	.699	.518
10. Cumberland Valley R. R	1.285	1.058
11. New York, Philadelphia and Norfolk R. R	1.094	.885
III.		
1. East Tennessee, Virginia and Georgia Rwy	.874	.675
2. Norfolk and Western R. R	.545	.362
3. Richmond and Danville R. R	1.355	.929
4. Western and Atlantic R. R.[2]		
5. Central Railroad and Banking Co. of Georgia	1.356	.972
6. Georgia R. R. and Banking Co.[3]		
7. Atlanta and West Point R. R	1.630	.931
8. Southern Rwy		
9. Western Rwy. of Alabama	1.090	1.077

[1] Financial report filed. Operations included in those of New York Central and Hudson River R. R.
[2] No report filed. Operations included in those of Nashville, Chattanooga and St. Louis Rwy.
[3] Financial report filed. Operations included in those of Georgia R. R.

The average receipts per ton per mile and estimated cost of carrying 1 ton 1 mile, as shown in

the preceding table, are on traffic in general. Comparisons will therefore be made of the figures in that table with the averages of the rates per ton per mile to the shorter-distance points on the six numbered classes—that is, on traffic in general.

The highest average receipt per ton per mile, it will be seen, of any road named in the table is that of the New York, New Haven and Hartford road, which is *1.74 cents*.

The averages of the rates per ton per mile, yielded by the rates in question to the shorter-distance points in Case No. 69, to wit, Calhoun, Adairsville, Kingston, Cartersville, Acworth, and Marietta, range from *3.84 cents* to Marietta to *3.89 cents* to Acworth, more than twice as high as the highest average receipt per ton per mile, namely, *1.74 cents*.

The averages of the rates per ton per mile under the rates in question to the shorter-distance points in Case No. 68, to wit, Greensboro, Madison, Social Circle, Covington, Conyers, and Stone Mountain, range from *3.44 cents* to Stone Mountain to *4.01 cents* to Greensboro, more than twice as high as the highest average receipt per ton per mile, *1.74 cents*.

The averages of the rates per ton per mile yielded by the rates in question to the shorter distance points in

Case No. 70, to wit, Newnan, Grantville, Hogansville, Lagrange, and Westpoint, range from *3.05 cents* to Newnan to *3.48 cents* to Hogansville, as against the highest average receipt of *1.74 cents*.

The averages of the rates per ton per mile to the shorter distance points in the three cases are from about *two to six times as large as* the average receipts per ton per mile on all the roads in the table.

The averages of the rates per ton per mile to the shorter distance points are from *three to eight times as large* as the *estimated cost* of carrying 1 ton 1 mile on all of the roads in the table.

Section 20 of the act to regulate commerce requires carriers to make annual reports to the Interstate Commerce Commission, and among other items embraced in those reports are the average receipts per ton per mile on traffic in general, and were up to the year 1894 the estimated cost of carrying 1 ton 1 mile. The figures in the above table, showing average receipts per ton per mile and estimated cost of carrying 1 ton 1 mile, are taken from the reports of the carriers named in that table, which reports were made under the law to the Insterstate Commerce Commission.

Counsel for the carriers, *appreciating the force of these figures*, attempted to show that this data is of no value

in determining whether rates are or are not excessive. For this purpose he asked witnesses for the carriers the following question:

"Can the number of tons carried 1 mile, or the number of tons carried of freight earning revenue, or the average receipts per ton per mile, or the estimated cost of carrying 1 ton 1 mile, either jointly or separately, be used for the *standard* of railroad rate making?" (See interrogatory 9, p. 69, Record in Case 70.)

The witnesses answered that it could not be used as *such standard*.

They were all, however, cross-examined on this point, and admitted that this data was useful in determining whether all the rates charged were or were not *excessive*. The court is asked to consider a few extracts from the testimony of these witnesses on this point.

J. M. Culp, traffic manager of the Southern Railway, testified as follows:

"Cross-question 25. Is not such data" (average receipts per ton per mile and estimated cost of carrying 1 ton 1 mile on traffic in general) "useful to some extent in determining whether an existing rate is or is not excessive?"

"Answer. It is useful in determining whether *all the rates* are excessive."

(Testimony, Record, pp. 73, 157, Case 70.)

It will be observed that the question in these cases now before the court is whether *all the rates*—that is,

rates on all traffic to the shorter distance points—are excessive.

Y. Van den Berg, traffic manager of the Louisville and Nashville Railroad, testified that the average receipts per ton per mile and the estimated cost of carrying 1 ton 1 mile "*may be a factor in some cases by which to judge of the reasonableness of a rate.*"

(Answer to cross-question 18, Record, p. 68, Case 68.)

T. S. Davant, general freight agent of the Norfolk and Western Railroad Company, testified, in answer to direct question 12:

"The average receipts per ton per mile, or the estimated cost of carrying 1 ton 1 mile, can not be used either singly or together as a *standard* in railroad rate making, for the reasons that the tariff *anticipates* the doing of the business, while these results can only be ascertained *after* the business is done."

(Record, p. 76, Case 68.)

This is equivalent to saying that experience of what have been reasonable rates in the past furnishes no light as to what may be reasonable rates in the future.

This witness, however, on cross-examination, in answer to cross-question 15, "Is not such data valuable to a certain extent in determining the reasonableness of a rate already in existence?" answered, "Measurably; yes, sir." (Record, p. 78, Case 68.)

It is a significant fact that the *carriers have been in the habit of making out for their own use and keeping record of this data long before the act to regulate commerce was passed and up to the present time*, and that the average receipts per ton per mile are easily ascertainable, and both the average receipts and estimated costs are the result of accurate calculation. This appears from the following extracts from the testimony of the witnesses for the carriers brought out on cross-examination:

George R. Knox testified as follows:

"Cross-question 52. Are not the average receipts per ton per mile the result of accurate calculation?"

"Answer. Yes, sir."

"Cross-question 53. Is not the estimated cost of carrying 1 ton 1 mile the result of accurate calculation?"

"Answer. Yes, sir; usually so."

"Cross-question 54. Have not the roads been in the habit of making up and recording this data for a series of years anterior to the year 1880?"

"Answer. I do not know how far back of 1880, but I think some roads did."

(Record, p. 132, Case 70.)

Y. Van den Berg testified as follows:

"Cross-question 19. How long have the roads been in the habit of making out these data—the average receipts per ton per mile and the estimated cost of carrying 1 ton 1 mile?"

"Answer. For as long as I have been connected with the railroads."

"Cross-question 20. You have been connected with them since 1880?"

"Answer. Yes, sir."

"Cross-question 21. What use do the roads make of these data?"

"Answer. It gives them a chance to know what the average rate per ton per mile is that they realize on their entire traffic that may be used for other purposes."

"Cross-question 22. These data are the result of calculation, are they not?"

"Answer. Yes, sir."

(Record, p. 68, Case 68.)

George R. Knox testified as follows:

"Cross-question 45. Have not railroads been in the habit of making out and recording this data as to average receipts per ton per mile and estimated cost of carrying a ton a mile for a long period of time?

"Answer. Yes, sir.

"Cross-question 46. As far back as 1880, and prior to that time?

"Answer. Some roads have, I think, as far back as that.

"Cross-question 47. Are not the average receipts per ton per mile the result of accurate calculation?

"Answer. I think so."

(Record, p. 157, Case 68.)

Counsel for the roads, therefore, in attempting to discredit this data, is confronted by the fact that it has been kept and recorded by the roads for their own use for a period long anterior to the passage of the act to regulate commerce. *The question is, Why have they put themselves to this trouble, and of what use is this data to them?* Unquestionably for the very purpose for which it is being used in these cases, namely, to enable them to see whether their rates are too low or

too high. Their witnesses testified positively that this data is useful in determining whether all the rates are excessive, and is a factor, taken in connection with others, to be considered in determining the reasonableness of rates.

In a brief filed by counsel for carriers in the "Chattanooga Case," he says, speaking of "average receipts per ton per mile" and "estimated cost of carrying 1 ton 1 mile:"

"I used the *same data* to show that certain proportions of through rates to Nashville which are received by certain of the defendant carriers are 'REMUNERATIVE.'"

By the word "remunerative" counsel explained that he meant "*any* remuneration over the additional cost of the movement of that particular traffic."

If this data is useful as showing whether rates yield *any* remuneration above the cost of service, does it not follow that it may also shed light upon the question as to whether or not the remuneration is excessive?

While this data does not indicate with mathematical accuracy what is a reasonable rate, yet the fact that rates yield a rate per ton per mile from two to six times larger than the average receipts per ton per mile on traffic in general on roads all over the country is a circumstance, in connection with others, showing or tending to show that that rate is excessive.

This is a self-evident proposition, and hence not susceptible of further elucidation.

We give below in parallel columns the conflicting opinions on this subject of counsel for the carriers and railroad officials whom he examined as EXPERTS in these cases:

MR. BAXTER'S OPINION.

On page 117 of his printed argument in these cases, filed in the circuit court, counsel for the carrier says:

"The average receipts per ton per mile of a road are of no value *except to show the proportion which the high-class traffic bears to the low-class traffic of a road.*"

OPINIONS OF RAILROAD OFFICIALS.

As seen above, Mr. Culp testifies:

"It" (average receipts per ton per mile and estimated cost of carrying a ton a mile) "is useful in determining whether all the rates are *excessive*. In other words, the average receipts of a road per ton per mile might be so much that taken in connection with other things it might be held that the rates were *excessive*."

As seen above, Y. Van den Burg testified as follows:

Q. "Are they" (average receipts per ton per mile, &c.) "standards in deter-

mining the reasonableness of a rate in a given case?"

A. "They *may be a factor* in some cases to judge it by, but they would not be a standard."

Q. "What use do the roads make of this data?"

A. "It gives them a chance to know what the average *rate* per ton per mile is they realize on their traffic, and may be useful for other purposes."

As seen above, T. S. Davant testified:

Q. "Is not such data of value to a certain extent in determining the reasonableness of a rate already in existence?"

A. "*Measurably;* yes, sir."

As seen above, George P. Biles testified:

Q. "What use do the roads make of this data?"

A. "Well, the idea is, I suppose, to compare one month with the corresponding month of the preceding year, or certain periods of one year with other years,

> to see whether or not *the rate per ton per mile* is going down or going up, and to look into that feature of it and see where the trouble is."

It thus appears that there is a radical difference of opinion between counsel for the carriers and his *expert* witnesses as to what this data is valuable for.

He says it is "*of no value except to show the proportion which the high-class traffic bears to the low-class traffic of a road.*"

His witnesses say it is valuable as showing whether "*all the rates are excessive;*" that it "*may be a factor in some cases to judge the reasonableness of a rate by;*" that it gives the roads a chance "*to know what the average rate per ton per mile is they realize on their traffic;*" and that it is "*measurably*" valuable in determining the reasonableness of a rate already in existence.

As we have seen, counsel for the carriers himself in the *Chattanooga Case* used it to show whether the proportions of through rates received by certain of the defendant carriers were remunerative.

It will be noted that the witnesses Van Den Burg and Biles testified that this data is useful as showing what the average *rate* per ton per mile is.

This data is, therefore, an *index to the rates* charged by the various railways named in the above table. If it be an index to the rates charged by those roads all over the country *embracing the principal defendants*, then the fact that the rates per ton per mile to the shorter distance points involved in these cases are from *2 to 6* times as high as the average receipts, and from *3 to 8* times as high as the estimated cost of carrying 1 ton 1 mile on all those roads, is a circumstance showing or tending to show that the rates to the shorter distance points are excessive.

WHILE RECEIPTS PER TON PER MILE WILL INCREASE AS THE PROPORTION WHICH HIGH-CLASS TRAFFIC BEARS TO LOW-CLASS TRAFFIC INCREASES, THOSE RECEIPTS WILL ALSO INCREASE AS THE RATES INCREASE.

On page 118 of his printed argument in circuit court, counsel for the carriers demonstrates the first half or clause of the above proposition, but makes no mention of the concluding clause.

For this purpose he supposes that the tonnage of a road carried one mile for each of three consecutive years is 2,000,000 tons; that during the first year one-fourth of the tonnage is first class, and carried at 5 cents a ton, and three-fourths Class A, and carried at 1 cent a ton; that the second year, one-half of the tonnage was Class 1, and the other one-half Class A, and carried at

the same rates as above named, respectively; and that the third year, three-fourths of the tonnage was Class 1, and the remaining one-fourth Class A, and carried at the same rates as named above, respectively. Under this state of facts, although the aggregate tonnage and rates remained the same each year, the average receipts per ton per mile would be for the first year 2 cents, for the second year 3 cents, and for the third year 4 cents.

This simply shows that the receipts per ton per mile are subject to variation, as the classes of traffic transported vary.

The fact remains, however, that if the rates on Class 1 traffic for the second year, for instance, were advanced to 7 cents, and to 2 cents on Class A traffic, the average receipts per ton per mile would be increased from 3 cents per ton per mile to 4½ cents. *This demonstrates that the amount of the average receipts per ton per mile is dependent upon the amount of the rate charged, as well as the proportion which high-class traffic bears to low-class traffic. Both are factors.*

If, therefore, as counsel for the roads says, the average receipts per ton per mile are valuable as "showing the proportion which the high-class traffic bears to the low-class traffic," it is equally valuable as showing whether *the rates charged are* HIGH OR LOW.

As heretofore shown, the carriers have from time immemorial made out these data for their own use. If the position of counsel for the carriers be true, *it is wholly valueless*, and they have been stultifying themselves in making it out. If, as counsel for the carriers says, it is only valuable as showing "the proportion which the high-class traffic bears to the low-class traffic," it is certainly a very indirect method of getting at that proportion. *The records kept by the carriers would certainly show the tonnage of each class of traffic transported by them.*

Chapter XVI.

COMBINATION OF THROUGH AND LOCAL RATES.

RATES TO SHORTER-DISTANCE POINTS EXCESSIVE, BECAUSE THEY ARE COMBINATIONS OF THROUGH AND LOCAL RATES.

THE HAULS TO THE SHORTER-DISTANCE POINTS ARE THROUGH HAULS, AND NOT PART LOCAL AND PART THROUGH.

LOCAL RATES MADE TO COVER THE EXTRA EXPENSE OF LOCAL HAULS PRIMA FACIE EXCESSIVE AS PARTS OF THROUGH RATES MADE FOR THROUGH HAULS.

GEORGIA RAILROAD COMMISSION RATES MADE TO COVER THE EXTRA EXPENSE OF LOCAL HAULS, AND THEREFORE EXCESSIVE AS PARTS OF THROUGH RATES.

RATES TO SHORTER DISTANCE POINTS COVER EXPENSE OF FOUR TERMINALS.

MISLEADING STATEMENTS OF COUNSEL FOR THE CARRIERS ON THIS SUBJECT.

The excessiveness of the rates to the shorter-distance points in these cases is further shown by the manner in which they are made. They are what are known as

combination rates; that is, they are the through rates to what are termed the *basing* points—Opelika, Atlanta, Chattanooga, or Augusta—plus or combined with the local rates from those basing points on or back to the shorter-distance points.

In Case No. 70 it is testified by Y. Van den Berg that the rates from eastern cities to Grantville, Hogansville, and Lagrange are based on the Atlanta rates—that is, they are the through rate to Atlanta plus the local rates on to Grantville, Hogansville, and Lagrange; and the rates to West Point are the through rates to Opelika plus the local rate from Opelika *back to West Point*. Newnan has rates lower than the combination of the through rate to Atlanta plus the local rate to Newnan, because of the fact that Newnan is located on the Central of Georgia Railroad as well as on the Atlanta and West Point. (Record, p. 89, Case 70.)

In Case No. 68 Y. Van den Berg testifies that the rates from eastern cities to Greensboro and Madison are based on the Augusta rates—that is, they are the through rates to Augusta plus the local rates from Augusta on to those points; that the rates to Social Circle on certain classes of goods (1, 2, and B) are based on the Atlanta rates—that is, they are the through rates to Atlanta plus the local rate from Atlanta *back to Social Circle*, and that the rates on the

other classes are based on the Augusta rates; that the rates on certain classes of goods to Covington (1, 2, 3, A, and B) are based on the Atlanta rates and the rates on the other classes based on the Augusta rates, and that the rates to Conyers and Stone Mountain are based for the most part on the Atlanta rates. (Record, Case 68, bottom p. 69.)

In Case No. 69 the rates from Cincinnati to Calhoun, Adairsville, Kingston, Cartersville, Acworth, and Marietta are made up of the through rates to Chattanooga and the local rates from Chattanooga on to those points. (Record, p. 119, Case 69.)

It thus appears that the hauls from New York to Opelika and to Atlanta, respectively, and from Cincinnati to Atlanta, are treated as through hauls and those points are given the benefit of through rates, while on the other hand the hauls to the shorter-distance points are treated as part through and part local hauls.

From this combination of local rates with through rates there result the materially higher rates to the shorter-distance points than to the longer-distance points.

This is because of the fact that the expense to the carrier on strictly local hauls is very much greater than on through hauls or any proportion of such through hauls, and the further fact that *local rates are*

therefore made much higher per mile than through rates, with a view of covering this extra expense on local hauls.

LOCAL HAULS MORE EXPENSIVE THAN THROUGH HAULS.

That the expense per mile on local hauls far exceeds that on through hauls or any proportions of through hauls, and that local rates for strictly local hauls are therefore properly made much higher per mile than through rates is a universally recognized fact, and is testified to by all the railroad officials examined as witnesses in this case.

Y. Van den Berg testified, "it costs considerably more to handle local than through traffic." (Record, p. 89, Case 70.)

G. R. Knox testified that "local freight of a road is handled under entirely different circumstances and conditions from through or competitive freight," and that the expense to the carrier of strictly local hauls is greater per ton per mile than on long through hauls. (Record, p. 184, Case 69.)

THE HAULS TO SHORTER-DISTANCE POINTS ARE THROUGH HAULS UNDER THROUGH BILLS OF LADING.

All the railroad officials examined as witnesses for the defendants further testified that traffic from New York

and other northeastern cities is "*consigned through*" to the shorter-distance points—Newnan, Grantville, etc., Greensboro, Madison, etc.—and from Cincinnati to Calhoun, Adairsville, Kingston, etc., under *through bills of lading* issued by the initial carrier and naming the *aggregate through rate*. In other words, traffic is not consigned to the so-called basing points—Atlanta, Augusta, or Opelika—and then reshipped from those cities on to or back to the shorter-distance points, but the traffic is consigned through to shorter-distance points.

J. M. Culp testified that "consignments are made through and through rates are given." (Record, p. 132, Case 69.)

ALL THROUGH LINES TO ATLANTA AND OPELIKA CAN ALSO BE FORMED TO SHORTER DISTANCE POINTS.

ALL THESE LINES COMPETE FOR BUSINESS TO SHORTER-DISTANCE POINTS.

These witnesses also testified that all the through lines which can be formed from New York to Opelika and Atlanta, and from Cincinnati to Atlanta, can also be formed to the shorter-distance points by combinations with the road or roads on which those shorter-distance points are located, and that the through rates by these various lines are the same to each of those

shorter-distance points and are published, and *that the agents of these different lines to the shorter-distance points advertise for and solicit traffic from New York and other Northeastern cities, and from Cincinnati to those shorter-distance points, in competition with each other.*

(Answer of Y. Van den Berg to cross-questions 1 and 2, page 82, Record in Case 70; answer of R. E. Lutz to cross-question 29, page 166, Record in Case 69; answer of George R. Knox to cross-question 36, page 185, Record in Case 69; answer of George R. Knox to cross-questions 36, 39, pages 156, 157, Case 68; answer of W. A. Winburn to cross-questions 32, 36, pages 144, 145, Record in Case 68.)

TRAFFIC COMES THROUGH TO SHORTER DISTANCE POINTS IN SAME CARS IN WHICH SHIPPED WITHOUT TRANSFER OR BREAKAGE OF BULK.

It further appears, from the uncontradicted testimony of witnesses for the complainant engaged in business at the shorter distance points, that goods are not only shipped through from New York and other Northeastern cities and from Cincinnati to the shorter distance points on through bills of lading naming aggregate rates, *but also, that they come through in carloads and in the same cars in which originally shipped without transfer or breakage of bulk.*

S. T. Whittaker, cashier of the bank of West Point, and who has been in business there for twenty-two years, testifies, in answer to interrogatory No. 10:

"They" (the West Point merchants) "do not buy their goods from Opelika, but buy directly from New York and other Eastern and Western cities. The goods are shipped to West Point under a through bill of lading on a through rate *and come through without transfer in carload lots.*" (Record, p. 49, Case 70.)

Luther S. Turner, a hardware and grocery merchant at West Point for twenty-two years, testifies, in answer to interrogatory 10:

"The goods shipped from New York and other Eastern cities" (to West Point) "are shipped on a through bill of lading and arrive in West Point *in the same cars in which they were loaded.*" (Record, p. 51, Case 70.)

C. V. Truit, a "supply" merchant at Lagrange for fifteen years, testified in answer to interrogatory No. 10:

"The bulk of the goods are bought in New York and shipped to Lagrange on a through bill of lading * * * *without breakage of bulk.*" (Record, p. 40, Case 70.)

Lee Trammell, a dry goods merchant at Madison for eight years, testified in answer to interrogatory 10:

"Madison merchants buy their goods generally direct from New York and the goods are shipped to Madison under through bills of lading, with through

rates named in the bill of lading, and after reaching Charleston the goods are hauled through to Madison and without transfer or breakage of bulk, and in the same cars in which they were originally loaded at Charleston." (Record, p. 32, Case 68.)

To the same effect is the testimony in answer to interrogatory 10 of H. H. Fitzpatrick, who has been engaged in "general farm supply business at Madison for eleven years," and also the testimony of S. A. Turnell, who has been engaged in the dry goods business at Madison for fifteen years.

Walter L. Sessions, a merchant at Marietta for fifteen years, testified in answer to interrogatory 10:

"Marietta merchants buy goods from Cincinnati and other sources of supply and their goods are shipped direct from Cincinnati and other Western points on a through bill of lading, and goods brought in carloads are hauled direct to Marietta without transfer or breakage of bulk *and in the same cars in which they were originally loaded or shipped.*" (Record, p. 90, Case 69.)

D. N. Anderson, merchant at Marietta for twenty years, testified in answer to interrogatory 10:

"Goods bought in Cincinnati and other points or sources of supply are shipped to Marietta in carload lots under a through bill of lading in the originally loaded car without transfer or breakage of bulk." (Record, p. 92, Case 69.)

To the same effect is the testimony in answer to interrogatory 10 of J. P. Legg, a merchant and

cotton buyer at Marietta for twelve years, and also that of H. C. Dobbs, hardware merchant at Marietta for eleven years.

J. W. Knight, a hardware merchant at Cartersville for twelve years, testified, in answer to interrogatory 10:

"Goods bought in Cincinnati are shipped to Cartersville on a through bill of lading naming a through rate, and if in carload lots are shipped without transfer and in the *same cars in which they are originally loaded.*" (Record, p. 81, Case 69.)

Thomas Lumpkin, a merchant at Cartersville for twelve years, testified, in answer to interrogatory 10:

"Goods are shipped from Cincinnati, Ohio, under a through bill of lading naming a through rate to Cartersville, and are hauled through without a transfer or breakage of bulk and in the *same cars in which they are originally loaded.*" (Record, p. 80, Case 69.)

To the same effect is the testimony of E. Strickland, grocery merchant at Cartersville for eleven years, and also of J. E. Field, engaged in selling mules, fertilizers, cotton, and machinery since 1887.

The freight, then, to the shorter distance points is through freight and the hauls have *every element of through hauls.* They are made under through bills of lading naming aggregate rates, and the shipments go through in carload lots in the *same cars* in which originally loaded, without transfer or breakage of bulk.

RATES TO SHORTER DISTANCE POINTS COVER EXPENSE OF FOUR TERMINALS.

Each rate is intended to *cover* the expense of the *two* terminals and the intermediate haul. As the rates to the shorter distance points are made up of two distinct rates, they cover the expense of *four* terminals, when that of *two* only is incurred.

CHARGE OF LOCAL RATE AS PART OF THROUGH RATE PRIMA FACIE EXCESSIVE. SO HELD BY THE COURTS AND THE COMMISSION.

There is no *extra expense* set up as justifying the charge of local rates for parts of these through hauls.

The charge of the local rates as a part of the through rates to the shorter-distance points, *where the hauls are not in fact local hauls* and *the extra expense of local hauls is not incurred*, is *prima facie* excessive. The Commission has so held, and so, also, has the circuit court of the United States for the southern district of Georgia in the case of Augusta Southern Railroad Company *v.* Wrightsville and Tennille Railroad Company, Judges Pardee and Speer presiding. In that case the court says:

"Nor does it follow, as insisted for the respondent, that the full local rate *permitted by the State law* is, in the absence of a contract between the roads for through shipment, a just or reasonable rate on freight *plainly*

not local, but through freight. Why is it reasonable that a railroad company should charge a higher rate for local than for through shipments?

"In *King* v. *Railroad Co.* (4 Interst. Commerce Com. R., 262) we find this clear proposition:

"'The local rates are made for many trains that run slow, stop generally at every station, delivering and taking on freight, chiefly in parcels not loaded or unloaded by the shippers or consignees, but loaded or unloaded by the servants of the company. They, of course, carry freight occasionally in carloads to local points. Such shipments are, of course, much more expensive than through freights, and for such services an additional charge is reasonable, and the laws permit it.'

"But *no fair or equitable construction will justify the exaction of local rates for freights not local where services belonging to local rates is not offered.*"

(74 Fed. Rep., p. 527.)

We contend that the rates to the shorter-distance points in these cases are shown to be excessive from the fact that as parts of those rates, local rates, in the language of the court above quoted, "*are exacted for freights not local and where services belonging to local rates is not offered.*"

GEORGIA RAILROAD COMMISSION RATES, CHARGED AS PARTS OF THROUGH RATES TO SHORTER-DISTANCE POINTS, MADE FOR LOCAL HAULS AND TO COVER EXTRA EXPENSE OF SUCH HAULS.

The Hon. Allen Fort, a member of the railroad commission of Georgia, was examined as a witness for the

commission in these cases, and testified that the rates from Augusta, Atlanta, and Opelika to the shorter distance points in these cases were established by the Georgia railroad commission *as local rates for strictly local hauls*, and *that in fixing those rates the Georgia railroad commission took into account the extra expense on local hauls over that of through hauls.*

(Question 5 to Allen Fort, p. 101, Record in case 69, and answer thereto, top p. 104, Record in case 69; same question and answer, pp. 51, 53, Record in case 68; same question and answer, pp. 57, 59, Record in case 70.)

CONTENTION OF COUNSEL FOR THE CARRIERS AND HIS WITNESSES THAT THE THROUGH RATES TO THE SHORTER DISTANCE POINTS ARE REASONABLE BECAUSE THEY ARE MADE UP OF THE THROUGH RATES TO THE LONGER DISTANCE POINTS, WHICH ARE CLAIMED TO BE REASONABLE AS SUCH THROUGH RATES, AND OF THE LOCAL RATES BETWEEN THE LONGER AND THE SHORTER DISTANCE POINTS, WHICH ARE CLAIMED TO BE REASONABLE AS SUCH LOCAL RATES.

Counsel for the carriers in his printed argument says:

"It would seem that a combination of the two rates, each of which is just and reasonable for the distance covered by it, would result in an aggregate rate which is just and reasonable for the sum of those distances."

The two rates referred to are the through rates to the basing points and the local rates between those points and the shorter distance points. The through rate may be reasonable as a through rate and the local rate reasonable as a local rate. But the local rate, while reasonable as a local rate for a strictly local haul, can not be held to be reasonable as a part of a through rate *for an entire through haul.* Hence the sum of the two rates does not result in a reasonable *through* rate.

This is a specimen of the many fallacies which underlie the entire argument of counsel for the carriers and upon which the superstructure of that argument is built.

The witnesses for the carriers, railroad officials, also give it as one ground of their opinion that the rates to the shorter distance points are reasonable, the alleged fact, that they are made up of rates which are reasonable for the through haul to the longer distance points, and rates which are reasonable for the local hauls between the longer distance points and the shorter distance points.

Bearing in mind always, that the hauls to the shorter distance points are strictly through hauls under through bills of lading, and in the same cars from beginning to end, without transfer, and in no sense local hauls, the fact that the rates are made up of rates reasonable for a longer through haul,

and rates fixed to cover the extra expense of strictly local hauls, is conclusive evidence of their excessiveness.

MISLEADING STATEMENT OF COUNSEL FOR CARRIERS IN RESPECT TO RATES FIXED BY GEORGIA RAILROAD COMMISSION.

(1) Counsel for carriers states in his printed argument that "*as the railroad rates in Georgia are fixed by a commission of that State, it is fair to presume that they are reasonably low.*"

If he had said that it is fair to presume that they are reasonably low as *local rates*, he would have been correct.

In view of the fact that they are shown to have been fixed to cover the extra expense of local hauls, they *can not be presumed to be reasonably low as parts of through rates.* The presumption, on the contrary, is that they are excessive as through rates.

Counsel for carriers lays great stress upon the *alleged fact* that by permission of the Georgia railroad commission some of the roads in Georgia charge for local hauls rates *higher* than the "*standard*" *local rates* charged by the carriers in these cases as parts of the through rates to the shorter distance points.

This alleged fact is wholly irrelevant and of no weight whatever, in view of the undisputed testimony of the

Hon. Allen Fort that the amount of these "standard rates" is fixed to cover the extra expense of strictly local hauls. They may be lower than other LOCAL rates in Georgia and still excessive as proportions of through rates on through hauls. Though low as local rates, they are still local rates fixed to cover the extra expense of local hauls, and, therefore, excessive as proportions of through rates. They are from four to five times as high per mile as the through rates.

For example:

Local rate per ton per mile from Atlanta to Lagrange = 11.4 cents.

Through rate per ton per mile from New York to Atlanta = 2.6 cents.

As said by the court in the Augusta Southern Railroad Company Case, "*no fair or equitable construction will justify the exaction of local rates for freights not local where service belonging to local rates is not offered.*" (74 Fed. Rep., p. 527.)

RATES TO SHORTER DISTANCE POINTS VIOLATE THE RULE THAT THE RATE PER TON PER MILE SHOULD DECREASE AS THE LENGTH OF THE HAUL INCREASES.

The general rule is that, while the aggregate rate constantly increases as the length of the haul increases, the rate per ton per mile decreases as the length of the haul increases. Yet we find the reverse of this rule

applied to the hauls to the shorter distance points involved in these cases. When, for instance, traffic from New York and other Northeastern cities is hauled to Atlanta, the rate per ton per mile decreases up to that point, but when it is hauled through Atlanta to Newnan, Grantville, Hogansville, Lagrange, or West Point, *the rate per ton per mile suddenly becomes many times higher per mile from the time the traffic leaves Atlanta.* This, too, although it is hauled on in the same cars in which brought to Atlanta, and without any extra expense.

Chapter XVII.

EFFECT OF COMBINATION OF THROUGH AND LOCAL RATES ON BASING POINTS OR TRADE CENTERS AND ON SHORTER DISTANCE SURROUNDING POINTS.

IT BUILDS UP THE BASING POINTS OR TRADE CENTERS AT THE EXPENSE OF SURROUNDING LOCALITIES.

(*a*) IT ENABLES MERCHANTS AT BASING POINTS OR TRADE CENTERS TO COMPETE ON EQUAL TERMS WITH MERCHANTS AT SURROUNDING POINTS ON THE STREETS OF THE LATTER.

(*b*) IT EXCLUDES MERCHANTS AT SURROUNDING POINTS FROM TERRITORY BETWEEN SUCH POINTS AND THE BASING POINTS OR TRADE CENTERS, AND GIVES THE MERCHANTS OF THE LATTER A MONOPOLY IN THIS TERRITORY.

MOTIVE OF THE CARRIERS IN ESTABLISHING THIS SYSTEM.

IT ENABLES THEM TO SECURE THE RATES FOR TWO HAULS, ONE A THROUGH RATE AND ONE A HIGH LOCAL RATE, WHETHER THE TWO HAULS ARE MADE OR NOT.

The result, if not the intent, of making the rates to localities surrounding basing points the through rates

to the basing points plus the local rates between the basing points and the surrounding points is to build up the basing points or trade centers at the expense of such surrounding points.

(*a*) In the first place, under this system, merchants at the basing points can ship goods from the point of origin of the traffic through surrounding points to the basing points and then reship them to surrounding points at the same aggregate rate as that charged when the goods are put off at the shorter distance points in the first instance. This enables merchants at the basing point to *compete on equal terms with merchants at surrounding points at the very threshold of the latter.*

Suppose the rate from shipping point to longer distance basing point to be 80 cents, and the rate from the basing point back to the shorter distance point 35 cents, under this combination system the rate to the shorter distance point will be the sum of the two rates, to wit, $1.15, and this is also the aggregate rate which the merchant at the longer distance point will have to pay for a haul from the shipping point to the basing point and for the haul from the basing point back to the shorter distance points. This is illustrated below.

DIAGRAM I.

Rate to longer distance point	$0.80
Local rate from longer distance point back to shorter distance point	.35
Rate to shorter distance points	1.15
Aggregate rate on reshipment from longer distance basing point back to shorter distance point	1.15

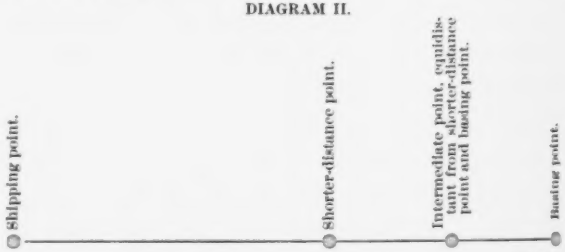
(*b*) *As to intermediate territory*—that is, territory between the longer distance basing point and the shorter distance point—the merchant at the latter is excluded therefrom and the merchant at the longer-distance basing point is given a *monopoly*.

If the merchant at the shorter distance point should undertake to sell goods at any point between the shorter-distance point and the longer distance basing point, *he will have to pay three rates*, to wit, the through rate to the longer distance basing point plus the local rate from the longer distance basing point back to the shorter distance point, plus the local rate from the shorter distance point on to the intermediate point; whereas the merchant at the longer distance basing point will only have to pay *two rates*, to wit, the rate

to the longer distance basing point plus the local rate back to the intermediate point.

If, in a given instance, the rate from the shipping point to the basing point is 80 cents, from the basing point back to the shorter distance point 35 cents, and to an intermediate point equidistant from the basing point and the shorter distance point 10 cents, then on a reshipment from the shorter distance point to this intermediate point the rate will be 80+35+10=$1.25, and the rate on reshipment from the basing point to this intermediate point will be 80+10=90 cents—the former rate exceeding the latter by 35 cents. This is illustrated below:

DIAGRAM II.



	Cents.
Rate from shipping point to basing point	80
Rate from basing point and shorter-distance point to intermediate point.	10
Rate from basing point to shorter-distance point	35
Rate on reshipment from basing point to intermediate point, 80+10	90
Rate on reshipment from shorter-distance point to intermediate point, 80+35+10	$1.25

In the illustration above given the intermediate point is supposed to be equi-distant from the basing point

and the shorter distance point, but the basing point will have the advantage in rates in all the territory between the shorter distance point and longer distance basing point. This advantage in favor of the basing point will *increase* from such intermediate point on to the basing point and will *decrease* from such intermediate point on to the shorter distance point, until at the latter, as we have seen, the longer distance basing point will be placed on terms of equality, so far as rates are concerned, with the shorter distance point.

MERCHANT AT SHORTER DISTANCE POINT NOT PLACED ON AN EQUALITY WITH MERCHANT AT BASING POINT ON STREETS OF THE LATTER.

If a merchant at shorter distance point reships goods to basing point he will have to pay 80 cents, the through rate to the basing point, plus 35 cents, the local rate from basing point back to shorter distance point, plus 35 cents, the local rate from shorter distance point to basing point, *a total rate of $1.50 as against a rate of 80 cents paid by the local merchant at the basing point.*

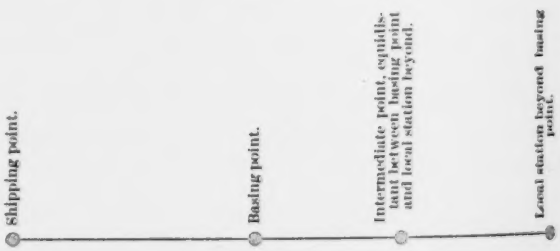
WHERE BASING POINT IS SHORTER DISTANCE POINT.

In the foregoing diagrams the basing point is the longer distance point and the rates to the shorter distance point are made up of the rate for the haul through the shorter distance point to the basing point plus the local rate back.

Where the basing point is the shorter distance point and the haul is from the point of origin of the traffic through the basing point to a locality beyond, the rate to the latter locality is the rate to the basing point plus the local rate from the basing point on.

In the latter case, where the basing point is the shorter distance point, the result of the combination of the through and local rates is exactly the same as in the case where the basing point is the longer distance point; that is, it enables the merchant at the basing point to compete upon terms of equality, so far as rates are concerned, with the merchant at the shorter distance point on the streets of the latter, and it also excludes the merchant at the shorter distance point from all the territory between the two points, and gives the merchant at the basing point an absolute monopoly in that territory.

This is illustrated below:


Shipping point.
Basing point.
Intermediate point, equidistant between basing point and local station beyond.
Local station beyond basing point.

Rate to basing point	$0.80
Local rate from basing point to local station beyond	.35
Rate from shipping point to local station beyond basing point	1.15
Rate from basing point and local station beyond basing point to intermediate point	.10
Aggregate rate on reshipment from local station beyond basing point to intermediate point, 80 cents + 35 cents + 10 cents	1.25
Aggregate rate on reshipment from basing point to intermediate point, 80 cents + 10 cents	.90
Excess of aggregate rate from local station beyond basing point	.35

WHERE BASING POINT IS LONGER DISTANCE POINT THE CARRIER CHARGES FOR SERVICES NOT RENDERED.

A distinction between the case where the basing point is the longer distance point and the case where the basing point is the shorter distance point is that in the former the carrier charges and receives compensation for two hauls not in fact made.

As an illustration of this we will take the case of West Point as the shorter distance point and Opelika as the basing point (case 70) on shipments from New York. The rates on such shipments are the rates for the haul through West Point 22 miles on to Opelika plus the local rate from Opelika 22 miles back to West Point, ALTHOUGH THE GOODS ARE PUT OFF AT WEST POINT AND NOT HAULED ON TO OPELIKA AND BACK.

In this instance the carriers receive pay for the haul from West Point to Opelika and from Opelika back to West Point when such hauls have not in fact been made.

In such cases the carrier receives the same compensation for a single through haul to the shorter-distance point as it would receive on two distinct hauls—one a through and one a local; the same compensation in fact as if it had hauled the goods through the shorter-distance point and delivered them at the longer-distance point and then hauled them back again to the shorter-distance point.

MOTIVE OF THE CARRIERS IN ESTABLISHING THIS SYSTEM.

The question arises, why does competition at the longer-distance point have the *precise* effect of enabling the merchant at the longer-distance point to monopolize the business in territory between the two points and to compete on equal terms with the merchant at the shorter-distance point at the *very doors of the latter* and also enable the roads to charge *for services not rendered?*

This can not be claimed to be the *accidental* result of greater competition at the longer-distance point. There is too much evidence of *design*. It must be presumed that the carriers intend the natural results of their rate adjustments, that they intend to charge for a service not rendered, and to give the basing points or trade centers, as they are sometimes called, the advantage over surrounding localities and to build

up those basing points or trade centers at the expense of such surrounding localities.

Why does not competition have this effect in Trunk Line Territory?

The inquiry naturally suggests itself, *cui bono?* What benefit can result to the carriers from such a system? What is their object? The answer is obvious. The tendency of this system is to make towns or localities surrounding basing points tributary or dependent upon such basing points for their supplies of goods. The basing points become, in other words, distributing points for surrounding territory, and the carriers thereby have the benefit of two hauls, the through haul to the basing point and the haul from the basing point at high local rates to surrounding localities; and if merchants at surrounding localities buy their goods direct from the sources of supply of those goods and not from the basing point, the carrier receives the same rate as if the goods had been shipped in the first instance to the basing point and then hauled back or on to surrounding localities.

IT IS THUS SEEN THAT THE CARRIER GETS THE BENEFIT OF TWO HAULS, OR OF TWO RATES, WHETHER THE MERCHANT AT THE SHORTER-DISTANCE POINT BUYS HIS GOODS AT THE BASING POINT OR NOT, AND

WHETHER OR NOT THE HAUL IS MADE ON TO THE BASING POINT AND BACK TO THE SHORTER-DISTANCE POINT.

Competition has "nothing to do with the case." It originated solely for the purpose of the carriers to "put money in their pockets" by unlawful methods. We say unlawful, because the result is unjust discrimination.

Chapter XVIII.

SOUTHERN TRADE CENTER SYSTEM.

THE COMBINATION OF THROUGH AND LOCAL RATES IS KNOWN AS THE SOUTHERN TRADE CENTER SYSTEM AND PREVAILS AS A RULE IN SOUTHERN TERRITORY AND NOT ELSEWHERE.

THE LONG AND SHORT HAUL RULE OF SECTION 4 AIMED AT THIS SYSTEM.

COMMENTS OF JUDGE COOLEY AND MR. ALDACE F. WALKER ON THIS SYSTEM.

PROBABLE ORIGIN OF THIS SYSTEM.

This system of combining through and local rates is known as the "Southern Trade Center System." It existed when the act to regulate commerce was passed, and now exists only in this Southern territory, and the long and short haul rule of the act to regulate commerce must have been aimed at this system.

In this connection there is set forth below as part of this argument what was said in reference to this Southern Trade Center System, or combination rate system,

by that eminent jurist and law writer, Judge Cooley, when a member of the Commission, in the case entitled *In re Louisville and Nashville Railroad Company* (1 I. C. C. R., pp. 84, 85):

"The preeminence of such trade centers in the territory reached by the petitioner's roads is peculiar, and has probably been increased by the concessions in rates which the railroads have made to them, while making less concessions or none at all to less important stations. This condition of affairs tends to perpetuate itself, and the disparity of rates as between competitive and non-competitive towns, the former being the trade centers, must have had some influence to increase steadily the *disparity in growth and prosperity*.

"By some of the witnesses before us this was bitterly complained of, while by others it was defended as being best for both classes of towns. The smaller towns in this part of the country, it was said, are *dependent* on the trade centers for their supplies, and they get indirectly the benefit of low rates to the distributing points in lower prices than could otherwise be given them. In proportion also as the distributing points are prosperous they can and do extend to the dealers at other points *credit and indulgence*. The prevalence of such ideas, and the acting upon them in making freight tariffs, gives to railroad managers a power of determining within certain limits what towns shall be trade centers and what their relative advantages; and while it may be, as they assert it is, that in deciding upon rates under the pressure of the competition of trade centers they endeavor to do justice between them, yet as they do not at the same time feel a like pressure from non-competitive points, it is obvious that justice to such points is in great danger of being overlooked, and it is altogether likely that it is so to some extent.

"*One result is that towns recognized by railroad managers as trade centers come to be looked upon* as towns with *special privileges*, and other towns strive for recognition as such, and complain perhaps of injustice when they fail. It was made very clear by the evidence produced in behalf of the railroads that the exceptionally favorable rates which were given to certain localities were in some cases *given to build up trade centers;* and as they had had that effect, and large establishments had been located at such centers, invited by the favoring rates, it was urged that there would be injustice in now compelling the roads to go back to the rule of equality. Of this it may be said, *first*, that as between different localities it is no sound reason for discriminating in favor of one as against another that the purpose is to build up the favored locality as a trade center; and, *second, if the discrimination has existed and has had its effect, the fact that large establishments have* thereby been encouraged is no reason why the injustice should be perpetuated. *This statute aims at equality of right and privilege, not less between towns than between individuals, and it will no more sanction preferential rates for the purpose of perpetuating distinctions than of creating them.*"

In the case of *Martin et al.* v. *Chicago, Burlington and Quincy Railroad Company* (2 I. C. C. R., 46, 47), Judge Cooley says in reference to the bearing of the act to regulate commerce on this Southern Trade Center System:

"But a fatal difficulty with the theory that a trade center as such is entitled to specially favorable rates is found in the fact that it is in conflict with the spirit and purpose of the act to regulate commerce. One of the reasons for the passage of that act was that, by means of rebates and other contrivances, large towns

and heavy dealers secured advantages which gave them a practical monopoly of markets and shut out the small towns and small dealers. * * * All large towns, by reason of their being large, inevitably secure certain advantages in transportation. They get more roads, more trains, more agents and servants to attend promptly to business demands, and will be more accommodated, within the limits allowed by law, than will smaller towns, but it does not lie within the power of this Commission to add to these advantages by compelling the carriers operating the lines which reach out from a great railroad center to give to the large towns on their lines more favorable rates than they give to those which are smaller. The fact that under relatively equal rates one town, by reason of its situation, its size, the extent of its manufactures or trade, or for any other reason, secures the major part of the trade with the small towns, is not a fact which can empower this Commission to interfere. There may be great hardships in the situation, but those do not change the law. In contemplation of a law which was enacted in the interest of equality as between large and small interests, there can be no unjust discrimination in giving to large and small towns relatively equal rates. It is not a matter of the least importance, in a legal sense, that the small towns are strictly local and noncompetitive. If, under relatively equal rates, they can elevate themselves to the class of jobbing towns, it is their right to do so."

In the case entitled "In re Tariffs and Classifications of the Atlanta and West Point Railroad Company et al.," Mr. Aldace F. Walker, then a member of the Commission, but who resigned to accept employment from a railway association, said on this subject (3 I. C. C. R., p. 19):

"Previous to the passage of the act to regulate commerce it was the universal custom *in this section of the country* to establish rates to certain basing points, subject to fluctuations occasioned by competition and otherwise, while rates to and from all other points were obtained by adding the local charges of the various terminal or initial roads to the rates at the basing points.

"These points were selected by reason of their situation upon navigable streams, or at the junction of railroad lines, or as determined by other considerations. Their number was large. The result of the system was that rates quite reasonable, and in some cases low, were given to and from the basing points, and that goods were thence distributed at high local charges in all directions. For example, the rates from New York or Chicago to Atlanta plus the rate from Atlanta to local points north, east, south, and west therefrom, were the rates charged from New York or Chicago to the latter points direct; and the latter rates were usually very much in excess of rates to distributing points situated at a greater distance over the same line in the same direction. *While this method was satisfactory to the centers which it created and maintained*, the smaller towns and rural communities protested against a system which worked so obviously to their disadvantage. Since the passage of the act the number of these favored localities has decreased in the Southern States, and upon many of the lines the disparity in rates as between them and intermediate or local stations has been diminished. So far as passenger traffic is concerned the rates are generally, if not universally, upon a mileage basis; except upon a few of the weakest roads they are 3 cents per mile."

In the case of the *Union Pacific Company* v. *Goodridge* (149 U. S., 690) this court says that the act to regulate commerce was designed "to cut up by the

roots the entire system of rebates and discriminations in favor of *particular localities*, special enterprises, or favored corporations, and to put all shippers on an absolute equality;" and the court also pertinently refers to the fact that carriers "deriving their franchises from the legislature and *depending upon the will of the people for their very existence*, are bound to deal fairly with the public * * * and to put *all their patrons upon an absolute equality*."

Origin of the system. Distributing points.

Trade centers are sometimes called distributing as well as basing points, and the fact that they were originally distributing points for surrounding localities may have originated the practice of charging through rates to the distributing point and local rates from the distributing point to surrounding localities, which then purchased their goods and supplies from distributing points. The distributing point was then a reservoir from which goods were sent out to surrounding localities. There were then two distinct hauls—a through haul to the distributing point and local hauls thence to surrounding points. The merchants at surrounding points in those days bought their goods from the distributing point, and not from New York or Cincinnati, the sources of supply.

The situation now, however, has wholly changed, and there is no excuse whatever for charging local rates as

parts of through rates to points surrounding trade centers or basing points. *The reason ceasing, the practice or rule should cease.* As the proof shows, merchants at the shorter-distance points do not buy their goods from Augusta, Atlanta, or Opelika, but direct from Cincinnati or New York and other Northeastern cities, and they are consigned and hauled through in carload lots in the same cars in which originally shipped to the shorter-distance points.

Chapter XIX.

BASING POINT OR TRADE-CENTER SYSTEMS OUTSIDE OF SOUTHERN TERRITORY.

BASING-POINT SYSTEM IN TRUNK-LINE TERRITORY.

DISTINCTION BETWEEN BASING-POINT SYSTEMS OUTSIDE OF SOUTHERN TERRITORY AND THE SYSTEM WHICH PREVAILS IN THAT TERRITORY.

THE LATTER VIOLATES THE LAW, THE OTHERS DO NOT.

WATER COMPETITION IN TRANSPORTATION FROM THE EASTERN SEABOARD TO CHICAGO HAS NOT RESULTED IN LOWER RATES TO CHICAGO THAN TO INTERMEDIATE POINTS.

LOWER RATES TO BASING POINTS OR TRADE CENTERS THAN TO SURROUNDING SHORTER DISTANCE POINTS NOT NECESSARY TO THE PROSPERITY OF THE FORMER.

Counsel for the carriers, in his printed argument, calls attention to the fact that basing points or trade centers are not confined to Southern territory. In this connection he cites the basing-point system in what is

known as trunk-line territory—that is, territory *north* of the Ohio and Potomac rivers and east of the Missis sippi as far as New York and Boston on the Eastern seaboard.

In this territory the rates from New York to Chicago are taken as the basis—that is, as 100 per cent—and the rates to intermediate shorter distance points are certain percentages of the New York-Chicago rate, the amount depending on the length of the haul.

For example, the rates from New York to Indianapolis are fixed at 93 per cent of the New York-Chicago rate—the distance from New York to Indianapolis being 825 miles and from New York to Chicago 912 miles. In like manner the rates from New York to Detroit are fixed at 78 per cent of the New York-Chicago rate; from New York to Cincinnati at 87 per cent; from New York to Columbus, Ohio, at 87 per cent, and from New York to Cleveland, Ohio, at 71 per cent.

It is thus seen that under this basing-point system there is no greater charge for the shorter than the longer haul.

This is a radical distinction between the Southern trade-center or basing-point system and the trunk-line basing-point system. The latter is not in contravention of the rule of the fourth section of the law, while the former is.

COMPETITION IN TRANSPORTATION FROM THE EASTERN SEABOARD TO CHICAGO AND OTHER COMPETITIVE POINTS IN TRUNK LINE TERRITORY HAS NOT NECESSITATED LOWER RATES TO SUCH POINTS THAN TO INTERMEDIATE SHORTER DISTANCE POINTS.

The points above named, Indianapolis, etc., are known as "competitive points," and the rates from New York and Boston to shorter-distance local points are in some cases made *as high as the rates to "competitive points" beyond, but not higher.*

All railroad authorities claim it to be a well-established fact that the rates from New York, Boston, and the Eastern seaboard points to Chicago and intermediate competitive points are influenced or controlled by water competition by lake and canal. *It is a significant fact that, notwithstanding this water competition, the rates to shorter distance local points are not made higher than the rates to longer distance competitive points beyond.*

COMBINATIONS OF RATES FROM THE EAST TO THE MISSISSIPPI WITH RATES FROM THE MISSISSIPPI ON TO THE WEST DO NOT RESULT IN HIGHER RATES TO THE SHORTER THAN TO LONGER DISTANCE POINTS.

Counsel for carriers also calls attention to the fact that there are *combination rates* in sections of the

country other than the South, and cites in support of this assertion the fact that rates from the East to points west of the Mississippi River are *combinations* of rates to the Mississippi with rates from that river on. *These combination rates, however, are not greater for the shorter than the longer haul over the same line.*

This *radical* distinction between those combination rates and the combination rates in vogue in the South, and illustrated in the present cases, is ignored by counsel for the carriers. *The former are lawful; the latter are unlawful.*

HIGHER RATES TO SHORTER THAN TO LONGER DISTANCE TRADE CENTERS NOT ESSENTIAL TO THE PROSPERITY OF THE LATTER.

In this connection the attention of the court is called to the fact that "trade centers" exist and flourish in this trunk-line territory and in the Northern and Western territory without the discrimination in favor of such trade centers which results from making the rates to surrounding shorter distance local points higher than to the trade centers. *This is a demonstration that this system of unjust discrimination which prevails in Southern territory is not essential to the maintenance and prosperity of trade centers in that territory.*

Chapter XX.

OBJECTION ON THE PART OF CARRIERS, THAT GIVING SHORTER DISTANCE POINTS RATES NOT HIGHER THAN THOSE TO LONGER DISTANCE BASING POINTS WOULD INJURE SUCH LONGER DISTANCE POINTS—IT WOULD INJURE NO LEGITIMATE INTEREST OF SUCH BASING POINTS.

IF THE SITUATION WERE REVERSED.

As we have seen, the operation or effect of the combination of through and local rates in making rates to shorter distance points around basing points or trade centers is to enable merchants at trade centers to *monopolize business in intermediate territory* and to *compete, at least on equal terms*, with local merchants at such surrounding points.

One of the witnesses for the roads, George R. Knox, stated as an objection to making the rates to the shorter distance points not higher than to the longer distance points, that in that event the longer distance points could not compete with the merchants at the shorter distance points *at their own doors* on equal terms; in other words, that rates relatively just would

drive Opelika and Atlanta merchants out of competition with the local merchants at shorter distance points at the *very doors of the latter.*

(Testimony of George R. Knox. Record, Case 69, p. 181.)

A merchant 40 or 80 miles away from a locality has no *natural* right to compete on equal terms at that locality with a merchant doing business there—at least he has no right to do this by means of *preferential rates.*

Therefore, giving shorter distance point rates not in excess of those to longer distance basing points would not be detrimental to any *legitimate* interests of the latter.

Moreover, as we have seen in another chapter of this argument, rates to shorter distance local points higher than to competitive points beyond have not been essential to the prosperity of such competitive points in Trunk Line, Eastern, and Western territories, and are, therefore, we may infer, not necessary to enable Southern trade centers to maintain themselves. In fact, as we have shown, the building up of local stations around trade centers, which would result from relatively just rates to those local stations, will "by reflex action" proportionately enhance the prosperity of the trade centers themselves.

If the situation were reversed!

Suppose the situation were reversed and preferential rates were given, for example, to Lagrange and West Point, under which they could compete on equal terms *at Opelika* with Opelika merchants, or to Madison or Social Circle, or to Cartersville, Acworth, or Marietta, under which they could compete on equal terms *on the streets of Atlanta* with Atlanta merchants.

According to an ancient fable, a wolf, seeing shepherds eating sheep, exclaimed: "What an uproar there would be if I were doing the same!"

If the shorter-distance points in these cases were given rates which would enable them to compete in the streets of Opelika or Atlanta with their local merchants, it would be considered as monstrous as if a sheep-killing dog or wolf were caught eating sheep.

It seems to be considered, however, the proper and just thing for Atlanta and Opelika. As Judge Cooley says, in one of the quotations heretofore made from him, "*one result is that towns recognized by railroad managers as trade centers come to be looked upon as towns with special privileges.*"

People who have enjoyed for a length of time monopolies or unjust advantages over their neighbors finally come to consider such advantages as due them by divine

right. All human experience, from the example furnished by kings on down, demónstrates this. It is startling that this should find illustration under a government "of the people, by the people, and for the people," and in the practices of corporations, which derive their "*right to exist*," as said by the Supreme Court, from the people. Counsel for the carriers urged before the court that the interest of the *public*, as represented by Atlanta, would be injured. No *legitimate* interest of Atlanta can be injured. Atlanta, moreover, is *not the entire public*. "There be others."

We do not believe, however, that Atlanta's interests will receive detriment, but that, as shown in a subsequent part of this argument, *Atlanta will in the end be benefited by a just adjustment of rates as between Atlanta and surrounding localities.*

Cincinnati and New York will not be benefited at the expense of Southern trade centers, Atlanta, Macon, etc.

It is claimed, also, that giving shorter distance surrounding points rates relatively just as compared with those to Southern trade centers will benefit the great sources of supply, New York and other Eastern seaboard cities, and Cincinnati, etc., at the expense of the Southern trade centers. This position is manifestly unsound. Those sources of supply will still

continue to be sources of supply *as they now are*, but not to any increased extent, *except as the prosperity of shorter distance points surrounding trade centers will be promoted by just rates and their demand for supplies increased.*

The proof shows that, even under existing discriminations, the merchants at shorter distance points now procure their supplies from New York and other Eastern seaboard cities and from Cincinnati, etc., and not from Atlanta or Opelika.

Chapter XXI.

What benefit to shorter distance points are competitive rates to basing points?

They do not do away with or ameliorate the discrimination.

It is claimed by counsel for the carriers and by his witnesses (railroad officials) that the shorter distance points have the benefit of the rates resulting from competition to the longer distance basing points. This at first sight seems plausible, but on examination it will be found to be only *plausible*.

Whatever benefit there might be to the shorter distance points in having their rates made up in part of the competitive rates to the longer distance basing points, is nullified or neutralized by the charge of the high local rates between the basing points and the shorter distance points as parts of the rates to the latter.

(*a*) In the first place, as we have seen, the charge of this local rate as part of the through rates to the shorter distance points makes the entire rate excessive,

and results in a rate per ton per mile to the shorter distance points from two to six times higher than the average receipts per ton per mile on roads all over the country embracing the principal defendants. These average receipts per ton per mile are proven, as we have shown by testimony of witnesses for the defendants, to be *the index of the rates* charged on these various roads.

(*b*) In the second place, the charge of these local rates between the longer distance basing points and the shorter distance points, as parts of the rates to the latter, enables the competitors in business of the shorter distance points, to wit, the longer distance basing points, *to compete with the merchants of the shorter distance points at their own doors and to monopolize the business in intermediate territory.*

What possible benefit, then, to the shorter distance points, from a business point of view, are the competitive rates to the longer distance points? *They do not ameliorate or do away with the discrimination against the former.*

The benefit of competitive rates to the longer distance points stops at and is confined to those points. *It does not flow onward to the shorter distance points, but is stopped by a dam in the shape of the high local rates charged between the competitive or basing points and the shorter distance points.*

If existing rates to the shorter distance points were reduced one-half this would not benefit those points in their competition with the longer distance points if the rates to the latter were also reduced one-half, and the present discrimination against the shorter distance points was thus maintained.

Chapter XXII.

COMPETITION CAN NOT JUSTIFY DISCRIMINATION TO THE EXTENT SHOWN IN THESE CASES.

THE AMOUNT OR EXTENT OF THE DISCRIMINATION A MATTER TO BE CONSIDERED BY THE COMMISSION AND BY THE COURTS.

We also contend, as heretofore stated, that *competition can not justify discrimination to the extent shown.*

It is manifest that although a substantial dissimilarity of condition resulting from competition may exist, the extent of the discrimination may be in excess of what is warranted by such dissimilarity of condition.

In the *Chattanooga Case* (85 Fed. Rep., 118), Judge Severens says on this point:

"When a violation of the long and short haul provision is charged, competition is one of the elements which enter into the determination of the question whether the conditions are similar, and if dissimilarity is found, *then the further question arises whether the dissimilarity is so great as to justify the discrimination which is complained of.* * * * In other words, my opinion is that the restraint of section four is to be applied upon the scale of comparison between the dissimilarity of conditions and the disparity of rates, and

that it is competent under that section to restrain the exaction of the greater charge for the shorter haul, although there may be a substantial dissimilarity of conditions, provided the dissimilarity is not so great as to justify the discrimination made."

Counsel for the carriers contends that Judge Severens is the only authority for the proposition that where a dissimilarity of conditions is shown the extent of the discrimination which the dissimilarity justifies is a matter to be considered and determined by the courts. In this we think counsel is mistaken. This court, in the *Alabama Midland Case* (168 U. S., 173), states "*that it would not approve the position that the determination of the extent to which discrimination is justified by circumstances and conditions should be left to the carrier.*" The following is an extract, bearing upon this question, from the opinion of the court in that case:

"The last sentence in this extract is objected to by the Commission's counsel as declaring *that the determination of the extent to which discrimination is justified by circumstances and conditions should be left to the carriers.* If so read, we should not be *ready to adopt or approve such a position.* But we understand the statement, read in the connection in which it occurs, to mean only that when once a substantial dissimilarity of circumstances and conditions has been made to appear the carriers are, from the nature of the question, better fitted to adjust rates to suit such dissimilarity of circumstances and their conditions than courts or commissions; and when we consider the difficulty, the practical

impossibility, of a court or a commission taking into view the various and continually changing facts that bear upon the question, and intelligently regulating rates and charges accordingly, the observation objected to is manifestly just. *But it does not mean that the action of the carriers, in fixing and adjusting the rates, in such instances, is not subject to revision by the Commission and the courts, when it is charged that such action has resulted in rates unjust or unreasonable, or in unjust discriminations and preferences.*"

In the concluding clause of the proviso to the fourth section of the law the authority is expressly conferred upon the Commission to prescribe the *extent* of the discrimination which may be justified under that section, as follows:

"The Commission may from time to time prescribe the *extent* to which designated common carriers may be relieved from the operation of this" (fourth) "section of the act."

This is an express recognition in the law itself of authority in the Commission to consider and prescribe the extent to which discrimination may be practiced under the fourth section, even where the circumstances and conditions are substantially dissimilar. If the circumstances and conditions are not substantially dissimilar, no discrimination at all can be practiced.

The amount or extent of the discrimination is, therefore, a matter to be considered and scrutinized by the court in this and all similar cases. If carriers are to

determine the extent of the discrimination a dissimilarity of condition in a given case may justify, then, whenever such dissimilarity is shown, the case is taken from under the law, and neither courts nor Commission have the power to interfere, and carriers are left at liberty to practice discrimination to any extent they please over and above the amount justified by the dissimilarity of condition.

In this connection the following extract from the opinion of Judge Severens in the "Chattanooga Case" is apropos:

"The argument of counsel for the carriers is in effect that the *extent* of the discrimination must be confided to the judgment of the railroad officials, whose ability and experience best qualify them for the task. If this be so, there is nothing for the Commission or the court to do but to take notice of the fact that the conditions are dissimilar and abandon all further inquiry. It is fundamental that no such proposition as this can be admitted."

Discrimination is claimed to be justified only on the ground that it is necessary to enable the carrier making the discrimination to meet competition and thus retain competitive traffic. In determining the extent to which a carrier may thus go in protecting its own interest, we should apply the maxim of the law "*so use your own that you do not injure the interest of another*" (*sic utere tuo ut alienum non lædas*). Under this rule discrimination is only justified to the extent that it may be

practiced without inflicting material injury on any *legitimate* interest of the public or any portion of the public. The Supreme Court recognizes this in the "Alabama Midland Case" when it holds that regard is to be had to the interests of the public as well as of the carrier, and in the "Social Circle Case" when it holds that the interests of the community from which the traffic is shipped and the community to which the traffic is shipped are to be considered, as well as the interests of the carriers.

Inasmuch as the carrier derives its franchise, its "right to exist," from the public, the interest of the public should be held to be paramount, and if in cases of conflict the interest of either is to be ignored, it should be that of the carrier.

In determining, therefore, whether discrimination is justified to the extent shown in these cases, it is proper to consider the effect of the discrimination on the shorter-distance points, the localities discriminated against. For this purpose I will call the attention of the court to the injury which has resulted to the shorter-distance points, as shown by the testimony in these cases of their leading merchants in different lines of business.

The following chapter of this argument will be devoted to that testimony:

Chapter XXIII.

INJURY TO SHORTER DISTANCE POINTS.

TESTIMONY OF MERCHANTS AT SHORTER DISTANCE POINTS SHOWING INJURY RESULTING FROM DISCRIMINATION IN FAVOR OF LONGER DISTANCE POINTS, ATLANTA AND OPELIKA.

It appears, in the first place, that Opelika merchants sell goods in competition with the local merchants at West Point, Lagrange, etc., and in territory adjacent to those points, and that Atlanta merchants sell goods at Stone Mountain, Conyers, Covington, etc., and at Marietta, Acworth, Cartersville, etc., and in territory adjacent to those points, in competition with their local merchants.

(See testimony in answer to direct interrogatories 3, 4, and 5 of S. T. Whittaker, cashier of the Bank of West Point; James S. Baker, merchant at West Point; Zach Hagedorn, wholesale and retail merchant at West Point; Luther S. Turner, merchant at West Point; Fuller E. Calloway, merchant at Lagrange; C. V. Truitt, merchant at Lagrange; W. V. Gray, merchant at Lagrange; E. R. Bradfield, merchant at Lagrange; Lee Trammell, merchant at Madison; H. H. Fitzpatrick, merchant at Madison; S. A. Turnell, merchant at Madison; L. J. Aldmand, merchant at Conyers; Walter L. Sessions,

merchant at Marietta; D. N. Anderson, merchant at Marietta; J. P. Legg, merchant at Marietta; H. C. Dobbs, merchant at Marietta; J. W. Vaughn, merchant at Cartersville; E. Strickland, merchant at Cartersville; J. E. Field, merchant at Cartersville.)

It is self-evident that where two localities are so situated with reference to each other that they compete for business in the same territory a system of rates which is preferential to one of those localities and discriminatory against the other benefits the one and injures the other—or, in other words, builds up the one locality at the expense of the other. The evidence of the witnesses, both for the defendants and for the complainant, is uniform in support of this proposition. In answer to direct interrogatory No. 6 the merchants above named testified that they could not successfully compete for business at their own doors in competition in the one case with Opelika merchants and in the other cases with the Atlanta merchants, and that this was because of the discrimination in rates in favor of Opelika and Atlanta.

(See answers of above-named merchants at West Point, Lagrange, Madison, Conyers, Marietta, and Cartersville in answer to interrogatory 6 (Record, pp. 77, 79, 81, 83, 85, 90, 91, 94, Case 69).

These witnesses all state that this discrimination in rates in favor of Opelika and Atlanta has existed for a

long series of years, and has greatly retarded the growth and prosperity of the localities discriminated against. S. T. Whittaker, cashier of the Bank of West Point, testifies in answer to interrogatory No. 9 that—

"A conservative estimate established that the discrimination against West Point in favor of Opelika has retarded the growth of West Point at least 40 per cent, as it has simply run all jobbers and wholesale merchants out of town and hampered the manufacturing interests to such an extent that new capital will not invest in that line. It has also hurt the price of real estate in proportion." (Record, p. 49, Case 70.)

James S. Baker, a West Point merchant for thirty-one years, testifies in answer to interrogatory No. 18 that—

"The difference in rates to Opelika and West Point is so much that it pays our farmers to haul goods from Opelika by wagons. Opelika merchants draw trade from within 4 miles of our town on account of said difference in prices caused by lower rates. The farmers say that it pays them to haul their cotton that distance and buy their goods from Opelika merchants on account of aforesaid difference in price." (Record, p. 48, Case 70.)

Zach Hagedorn, a wholesale and retail merchant at West Point for twenty-six years, in answer to interrogatory No. 18 testifies that—

"It is a fact that the discriminating rates have caused many of our merchants to be less prosperous

than they would have been. For example, the section of country between West Point and Opelika known as Casseta district formerly gave all its trade to West Point, and we have examples almost daily of the effect of the lower rate in favor of Opelika—hence our losses. I also state that the rate given to Opelika makes it a better cotton market; therefore loses to West Point the marketing of a great deal of cotton from a country or section directly tributary to West Point." (Record, p. 46, Case 70.)

Fuller E. Calloway, merchant at Lagrange for nine years, in answer to interrogatory No. 8 testified that—

"Opelika merchants ship first-class freight from New York City through Lagrange to Opelika for $1.14 per hundred pounds. The Western Railway of Alabama and the Atlanta and West Point Railway haul first-class freight from Opelika to Lagrange for 32 cents per hundred pounds. This makes a total rate on first-class freight from New York to Opelika and then hauled back to Lagrange of $1.46 per hundred pounds, while the said carriers charge and collect the sum of $1.53½ per hundred pounds to haul first-class freight from New York City to Lagrange. In doing this the carriers haul first-class freight 38 miles beyond Lagrange and haul it back to Lagrange for 7½ cents per hundred pounds less than they will stop it at Lagrange. *This enables the Opelika merchant to ship his goods from New York City through Lagrange to Opelika, 38 miles beyond, and then reship them back to Lagrange at 7½ cents per hundred pounds less (on first-class freight) than the Lagrange merchant can ship them direct from New York to Lagrange. This enables the Opelika merchant to undersell the Lagrange merchants at their front doors 7½ cents per hundred pounds and make the same profit.*" (Record, p. 39, Case 70.)

W. V. Gray, a Lagrange merchant for twenty-two years, in answer to interrogatory No. 8, testifies that—

"Opelika merchants can get goods laid down at their own town and reshipped to Lagrange for less than original Lagrange rates." (Record, p. 41, Case 70.)

E. R. Bradfield, a merchant at Lagrange for twenty-five years, in answer to interrogatory No. 8, testifies hat—

"Opelika merchants can haul goods to their own town and reship back to Lagrange for less than Lagrange can get them." (Record, p. 42.)

Lee Trammell, a merchant at Madison, Ga., for eight years, in answer to interrogatories 8, 17, and 18, testifies as follows:

"Goods can be shipped from the Eastern and Northern points to Atlanta and then reshipped to Madison and points around and beyond Madison at a less rate of freight than Madison has on same class of goods shipped from Eastern and Northern points. The rate on first-class freight from Eastern points through Madison to Atlanta is $1.14 per hundred pounds, but if stopped off at Madison the freight is $1.43 per hundred pounds; the goods reaching Madison over the Georgia Railroad.

"Rates which discriminate against a locality stagnate business in the locality discriminated against and retard its growth and progress, for the reason that no business enterprise can succeed or be built up where the merchants or manufacturers of the locality can not successfully compete in prices in their own territory with outside merchants who sell in their territory by reason of high freight rates to the particular locality.

"Madison merchants are unable to do any business with the country stores in this county, for the reason that Atlanta, Athens, and Milledgeville merchants, by reason of lower freight rates, can and do sell them goods at a profit at the same price that it costs the Madison merchants to deliver the goods at Madison, owing to high rates of freight to Madison." (Record, pp. 32, 33, Case 68.)

H. H. Fitzpatrick, merchant at Madison for eleven years, testifies, in answer to interrogatories 16 and 18:

"Low rates to a locality have a marked effect in increasing the population of the locality and inducing the investment of capital. Capital, ordinarily, will not go to a place where freight rates are high. High rates drive away wholesale merchants from Madison because they can not compete with Atlanta. All mercantile and manufacturing enterprises are more or less dependent for success on the rate of freight to the locality.

"There are about twenty country stores in this county outside of any town or village. By reason of the discrimination in the rate of freight in favor of Atlanta, and against Madison, these stores buy their goods as cheap or cheaper than the merchants of Madison. The Madison merchants can not sell their goods, because they can not compete with Atlanta." (Record, p. 34, Case 68.)

S. A. Turnell, merchant at Madison for fifteen years, testifies in answer to interrogatories 8, 17, and 18:

"The freight rate on first-class freight from all Eastern points to Atlanta is $1.14 per hundred, while the rate to Madison is $1.43. If the goods are left off at Madison the freight is $1.43 per hundred, or if carried

beyond Madison 68 miles to Atlanta the rate is only $1.14 per hundred.

"Relatively high rates to a locality drive away capital and business enterprises. No business enterprise can succeed unless it can compete in prices with other merchants who sell in the territory where the enterprise is located.

"Madison merchants, being unable to compete in prices with Atlanta, can not sell goods to the many country stores in this county. These country stores can buy their goods as cheap as the Madison merchants, and as they have no city taxes to pay their expenses are light. They draw much trade from Madison. If Madison had the same rates as Atlanta, her merchants would sell goods to these country stores, and the trade that is now induced away from us would come back." (Record, pp. 35, 36, Case 68.)

L. J. Aldmand, merchant at Conyers for nine years, testifies, in answer to interrogatories 9 and 18:

"This discrimination" (in favor of Atlanta) "has been going on ten or fifteen years. It has the effect of killing all manufacturing enterprises and jobbing houses (at Conyers, etc.).

"*Manufacturing enterprises have been started in Conyers which have moved away on account of the difference in freight rates against Conyers. H. D. Terrell, manufacturer of plows, moved to Macon on this account.*" (Record, p. 40, Case 68.)

Walter L. Sessions, merchant at Marietta for fifteen years, in answer to interrogatory No. 9, says:

"It" (discrimination in favor of Atlanta) "has had the effect of causing all merchants who desired to do a wholesale business to leave Marietta and other points

around here and go to Atlanta to do business, and has retarded the growth of Marietta by carrying away business and capital, and *has helped to build Atlanta at the expense of Marietta. It has caused some factories to leave here for Atlanta, and a number of our citizens do business at Atlanta and live in Marietta.*" (Record, p. 90, Case 69.)

D. N. Anderson, merchant at Marietta for twenty years, states, in answer to interrogatory 18:

"I am a cotton dealer at Marietta and ship about 6,000 bales of cotton a season. The Western and Atlantic Railroad has been charging me on through cotton through Atlanta 19 cents a hundred, but by shipping to Atlanta and reshipping to the ports I get it at 13 cents a hundred, the commission rate." (Record, p. 92, Case 69.)

J. P. Legg, merchant and cotton buyer at Marietta for twelve years, testifies, in answer to interrogatory 18:

"All we want is equalized freight rates with other localities on the same road. Our natural advantages are good, but we will always be at a disadvantage when goods can be hauled from Cincinnati through Marietta to Atlanta for a less rate of freight than they can be brought to Marietta from the same places." (Record, p. 94, Case 69.)

H. C. Dobbs, merchant at Marietta for eleven years, in answer to interrogatories 8, 9, and 17, states:

"Take nails. Atlanta merchants can buy nails at Cincinnati and haul them to Atlanta through Marietta and reship them back to Marietta and sell them at the same that I can when I buy at the same place and in

carload-lots. They can compete with me here and at points around here just as if they did business in the same town with me, yet Atlanta is 20 miles farther away from Cincinnati than Marietta is.

"It" (discrimination in rates) "has existed ever since I have been in business, and I do not know how much longer; and this has had the effect of retarding the growth of our town. We ought to have a population of from 10,000 to 15,000, while we only have about 5,000. *The discriminating freight rates drive away both capital and population.*

"Relatively high rates to a locality tend to drive away capital and also population, and hinder prosperity. I know of a factory that moved from Marietta to Atlanta, on the line of the same railroad it was already on, because of the big difference of freight rates in favor of Atlanta and against Marietta. A man who wanted to build a factory of any kind would not be apt to go to a place where there were high freight rates if he could find a place where they were very much lower. It is this way with Marietta and Atlanta. One has a high rate, the other a low rate, and it has caused a great many of the citizens of Marietta to move to Atlanta to do business, or to live here and do business in Atlanta." (Record, pp. 94, 95, Case 69.)

James W. Vaughn, merchant at Cartersville for seven years, testifies, in answer to interrogatories 8, 9, and 19:

"First-class rates from New York to Atlanta or Rome is $1.14 per hundred pounds, and to Cartersville $1.38. This difference of 24 cents against us would cover our profit on heavy or staple goods.

"This discrimination against Cartersville in favor of Atlanta and Rome has existed ever since I have lived

in Cartersville, to my certain knowledge. It has retarded the growth of Cartersville and makes it impossible to do a wholesale or jobbing business here.

"It is impossible for a locality to thrive or prosper unless it can share the same through rates as other localities with which it would naturally compete for business. Capital seeking investment would not locate at a point where there is the least discrimination in freight rates against such locality, and for that reason Cartersville has not been successful in inducing the building of or fostering manufacturing enterprises. We can not conduct a wholesale business in any line of manufacture until we secure a lower rate." (Record, pp. 77, 78, Case 69.)

J. W. Knight, merchant at Cartersville for twelve years, in answer to interrogatory 9, states:

This discrimination in rates against Cartersville has existed to my certain knowledge ever since I have been in business here. Merchants here could do no jobbing business; all the trade has had to be purely local, and that always retards the growth of any town." (Record, p. 81, Case 69.)

Thomas Lumpkins, merchant at Cartersville for twelve years, in answer to interrogatories 16 and 19, says:

"My implement and machinery business extends over a large territory. I frequently find that I can ship goods to Cartersville and distribute them with profit, and successfully compete with the merchants of Atlanta, because of the discrimination in rates in favor of Atlanta. This always applies to buggies and wagons. *I have often found it necessary to ship goods to Atlanta in less than carload lots and then reship to Cartersville, and could thereby save freight.*

"Rome and Atlanta having the same freight rate, which is lower than that to Cartersville, and Cartersville being situated between the two, this discrimination in favor of Rome and Atlanta is ruinous to the business of Cartersville. Cartersville being situated in the center of a fine agricultural and mineral region, if it had the same freight rates as Rome and Atlanta the business of Cartersville would be very greatly increased. The property would increase in value, the population would increase, and the town and community generally would be benefited." (Record, p. 80, Case 69.)

J. E. Field, merchant at Cartersville for ten years, testifies, in answer to interrogatory 19:

"There have been several manufacturing enterprises here which have had to close up their business and leave on account of the discrimination in rates against Cartersville. They could not successfully compete with other points which had a lower rate." (Record, p. 84, Case 69.)

In the face of this uncontradicted testimony, counsel for carriers said in his argument before the circuit court: "*Atlanta is benefited. Who is injured? There is no proof of injury to anyone!*"

Discrimination is contrary to natural right, and is abhorrent to the law. The leading feature of the act to regulate commerce is the provision of a remedy for unjust discrimination, and in particular for discrimination as between different localities. In the language, heretofore quoted, of the Supreme Court of the United States in *Union Pacific Company* v. *Goodrich* (149 U.

S., 680), the law was designed to "cut up by the roots the entire system of rebates and discriminations in favor of *particular localities*, special enterprises, and favored corporations."

If discriminations such as are shown by the undisputed evidence in these cases, resulting in material damage and the grossest injustice to shorter distance points, do not fall within the evil intended to be remedied by the act to regulate commerce, then it will be difficult to conceive of a case of discrimination which would come within the purview of that act.

Discriminations which result in the very abuses which the act to regulate commerce was designed to remedy can not be justified under the act.

COMPETITION, NO MATTER HOW FORCEFUL, SHOULD NOT BE HELD TO NULLIFY THE LAW.

Chapter XXIV.

The prejudice to shorter distance points "undue and unreasonable" under section 3 of the law.

It is conceded by counsel for the carriers in his printed argument that section 3 of the law may apply even where section 4 does not.

Section 3 forbids discriminations which result in "*undue prejudice and disadvantage.*"

Can it be held that the "prejudice or disadvantage" to the shorter distance points, shown by the undisputed testimony of merchants at those points *and set forth in the preceding chapter*, is a due and reasonable prejudice or disadvantage under section 3 of the law?

Can it be said that a prejudice or disadvantage is *due and reasonable* in contemplation of the law, which, in the language of S. T. Whittaker, a Westpoint banker, "*has retarded the growth of Westpoint at least 40 per cent, and has simply run all jobbers and wholesale merchants out of the town, and hampered the manufacturing interests to such an extent that new capital will not invest in that line?*"

Can a prejudice or disadvantage be held to be *due and reasonable* in contemplation of the law which, in the language of Fuller E. Calloway, a Lagrange merchant, "*enables the Opelika merchant to ship his goods from New York through Lagrange to Opelika, 38 miles beyond, and then reship them back to Lagrange at 7½ cents per hundred pounds less (on first-class freight) than the Lagrange merchant can ship them direct from New York to Lagrange,*" and which "*enables the Opelika merchants to undersell the Lagrange merchants at their front doors 7½ cents per hundred pounds and make the same profit?*"

Can a prejudice or disadvantage be held to be *due and reasonable* under the law which, as shown by the testimony of L. J. Almond, a merchant at Conyers, Ga., has "*had the effect of killing all manufacturing enterprises and jobbing houses at Conyers*" and has caused "*manufacturing enterprises that have been started in Conyers to move away on account of the difference in freight rates against Conyers?*"

Can a prejudice or disadvantage be said to be *due and reasonable* under the law which, as testified by Walter L. Sessions, a merchant at Marietta, Ga., "*has had the effect of causing all merchants who desire to do a wholesale business to leave Marietta and other points around here and go to Atlanta, and has retarded the growth of*

Marietta by carrying away business and capital, causing some factories to leave Marietta for Atlanta, and thereby building up Atlanta at the expense of Marietta?"

Can a prejudice or disadvantage be held to be *due and reasonable* in contemplation of the law, under which, as testified by James W. Vaughan, a merchant at Cartersville, Ga., "*first-class rates from New York to Atlanta or Rome are $1.14 per hundred pounds, and to Cartersville $1.38, which difference of 24 cents against Cartersville would cover the profit on heavy or staple goods,*" and which "*has retarded the growth of Cartersville, and makes it impossible to do a wholesale or jobbing business there,*" and which, in the language of Thos. Lumpkins, also a merchant of Cartersville, *has made* "*necessary for Cartersville merchants to ship goods to Atlanta in less than carload lots, and then reship to Cartersville, thereby saving freight,*" and which, in the language of J. E. Field, another Cartersville merchant, *has caused several* "*manufacturing enterprises at Cartersville to close up their business and leave on account of the discrimination in rates against Cartersville.*"

If such prejudice and disadvantage can be held to be *due and reasonable under section 3*, what prejudice and disadvantage could be held to be undue and unreasonable?

If such prejudice and disadvantage can be held to be due and reasonable under section 3, what field of

operation has that section, and what abuses was it intended to remedy?

We repeat, as said in the preceding chapter, COMPETITION, NO MATTER HOW FORCEFUL, SHOULD NOT BE HELD TO NULLIFY THE LAW ITSELF.

The act to regulate commerce is on trial for its life in these cases on the charge of total inefficiency. It should not be condemned unless shown to be guilty beyond all reasonable doubt.

Chapter XXV.

MATERIALITY OF PROOF OF INJURY RESULTING FROM DISPARITY OF RATES RECOGNIZED BY THIS COURT IN "IMPORT CASE" (162 U. S., 239).

MATERIALITY OF SUCH PROOF SHOWN BY THE LANGUAGE OF SECTION 3 OF THE LAW.

THE PROOF OF INJURY OR PREJUDICE TO THE SHORTER-DISTANCE POINTS MADE IN THESE CASES DISTINGUISHES THEM FROM THE "SOCIAL CIRCLE CASE" AND ALL THE OTHER CASES UNDER THE ACT TO REGULATE COMMERCE WHICH HAVE BEEN BEFORE THIS COURT.

The proof made (see Chapter XXIII, *supra*) in these cases by merchants at the shorter distance points of the injury or prejudice resulting to them from the discrimination in rates against them and in favor of the longer distance points *is positive and specific and no attempt to controvert it has been made in behalf of the carriers.*

The materiality of such proof is recognized by this court in the "Import case" (*Texas and Pacific Ry. Co.*

v. *The Interstate Commerce Commission*, 162 U. S. 239), where it is said:

"The mere fact that the disparity between the through and the local rates was considerable did not, of itself, warrant the court in finding that such disparity constituted an undue discrimination, much less did it justify the court in finding that the entire difference between the two rates was undue or unreasonable, ESPECIALLY AS THERE WAS NO PERSON, FIRM, OR CORPORATION COMPLAINING THAT HE OR THEY HAD BEEN AGGRIEVED BY SUCH DISPARITY." (The small capitals are mine.) (162 U. S., 239.)

Here is a statement that no claim of injury had been made in the "Import Case," and an emphatic recognition of the materiality of proof of such injury. The court in effect says that while the mere fact of the disparity in rates would not warrant the court "in finding that such disparity constituted undue discrimination," yet that fact, accompanied by proof of injury, might warrant a finding that the injury was "undue."

MATERIALITY OF SUCH PROOF SHOWN BY THE LANGUAGE OF SECTION 3 OF THE LAW.

Section 3 of the law forbids preferences in rates between localities resulting in "*undue or unreasonable prejudice* or *disadvantage*." The words "undue or unreasonable" *ex vie termini* call for measurement or consideration of the *extent* of the injury or prejudice resulting from the discrimination and for proof in relation thereto.

THE PROOF OF INJURY MADE IN THESE CASES DISTINGUISHES THEM FROM, AND RENDERS THEM STRONGER THAN, THE "SOCIAL CIRCLE CASE" OR ANY OTHER CASE UNDER THE ACT TO REGULATE COMMERCE WHICH HAS BEEN PRESENTED TO THIS COURT.

Chapter XXV a.

SOCIAL CIRCLE CASE.

PRESENT CASES STRONGER AGAINST CARRIERS THAN THAT CASE.

DISTINCTIONS BETWEEN SOCIAL CIRCLE CASE AND PRESENT CASES.

NO WATER COMPETITION IN PRESENT CASES.

NO PROOF OF INJURY IN SOCIAL CIRCLE CASE.

In the Social Circle case, the defendant carriers attempted to make the haul to Social Circle *a part through and a part local* haul by charging through rates to Atlanta and a local rate from Atlanta on to Social Circle.

(*Cinti., N. O. & T. P. Ry. Co.*, v. *I. C. C.*, 162 U. S., 184.)

This court held, however, in effect, that a through haul could not thus be converted into *a part through and a part local haul*, but that, the carriage being a continuous carriage, the line to Social Circle was a through line and the rates through rates, and subject to the regulating authority of the courts and Commission under the commerce law.

By the charge of the local rate from Atlanta to Social Circle the through rate to Social Circle was made greater than the rate for the haul through Social Circle on to Augusta. (56 Fed. Rep., p. 925.)

Notwithstanding Social Circle was shown to be a strictly *local* noncompetitive point and Augusta a competive point, the circuit court of appeals and this court held in effect that the higher rate to Social Circle, *thus made higher by the charge of the local rate from Atlanta to Social Circle*, was illegal, and sustained the order of the Commission prohibiting the higher charge to Social Circle than to Augusta.

The present cases stronger against the carriers than was the Social Circle case.

The present cases are distinguished from the Social Circle case in some respects, which render them much stronger cases against the carriers.

(*a*) In the first place, in the present cases through rates to the shorter distance points are named in the bills of lading, and the proof shows that the different lines of transportation "*advertise*," "*solicit*," *and* "*compete* for" business from New York and other Northeastern cities and from Cincinnati to the shorter distance points. *Per contra*, in the Social Circle case the bills of lading only set forth through rates to Atlanta, and

there was no proof that the different lines of transportation advertised, solicited, or competed for business from Cincinnati to Social Circle.

(*b*) In the Social Circle case it was proven that there was *water competition* by ocean and the Savannah River to Augusta. *Per contra*, in the present cases there *can be no valid claim* that there is water competition to either of the longer-distance points, Atlanta or Opelika, to the benefit of which the shorter-distance points are not equally entitled. *They are far inland, and are reached by no navigable stream or body of water.*

In his printed argument, counsel for the carriers states that the "rates from New York and other North Atlantic ports to Augusta and Atlanta are controlled by water competition to and through the ports of Savannah and Brunswick." Can any reason be given why the rates to the points between Augusta and Atlanta are not also controlled by that water competition?

It seems that the influence of this water competition travels on from Augusta to Atlanta through the intermediate shorter-distance points. By what process is it suspended as it passes through Greensboro, Madison, Social Circle, Covington, Conyers, and Stone Mountain on its way to Atlanta?

(c) Another material distinction between the present cases and the Social Circle case is that proof of injury or prejudice resulting from the discrimination has been made in these cases. In the Social Circle case no injury is shown or attempted to be shown. As to the materiality of such proof, see Chapter XXV, *supra*.

In the present cases, as was in effect held by the circuit court to be the fact in the Social Circle case, the higher rates to the shorter distance points are *the result of the charge of local* rates as parts of those rates. If higher rates to Social Circle resulting from this cause were unlawful, then *a fortiori* rates thus made up to the shorter distance points in these cases, which are proven themselves to be competitive points, are unlawful.

Chapter XXVI.

THE INTERESTS OF THE PUBLIC TO BE FIRST CONSIDERED.

WHO ARE THE PUBLIC AND WHAT ARE THE PUBLIC INTERESTS?

MAGNITUDE OF THE PUBLIC INTERESTS AT THE SHORTER-DISTANCE POINTS AND IN THE TERRITORY SURROUNDING THEM.

This court has taken particular pains, in all its decisions holding that competition may justify discrimination, to *safeguard the interests of the public.*

Alabama Midland case (168 U. S., 164).

L. & N. R. R. Co. v. *Behlmer* (175 U. S., 649).

T. & P. Ry. Co. v. *I. C. C.* (162 U. S., 233).

In the "Alabama Midland case" the court holds that "the competition *may* in some cases be such as, having due regard for the *interests of the public* and the carrier, ought justly to have effect upon the rates;" and, in *L. & N. R. R. Co.* v. *Behlmer*, that the right to discriminate is "in every event to be only enjoyed with a due regard to the *interests of the public*, after giving full weight to the benefits to be conferred on

the place from whence the traffic moved as well as those to be derived by the locality to which it is to be delivered;" and, in *T. & P. Ry. Co.* v. *I. C. C.*, that consideration must be had of the interests of the community at the locality from which the goods are shipped and the interests of the community at the locality to which the goods are shipped, as well as the interests of the carrier.

WHAT ARE THE PUBLIC INTERESTS REFERRED TO?

The words "interests of the public," as used by this court in the "Alabama Midland case" and in the "Behlmer case," and in all the cases, of course refer to *legitimate* interests of all portions of the public affected, and not to interests of certain localities created and fostered by favoritism in rates.

It may be that the interests of Opelika and Atlanta, the longer distance points in these cases, built up by discrimination against surrounding shorter distance competitive points, would be injuriously affected by doing away with the existing preferences in rates in favor of such longer distance points and against such shorter distance points; but this is not a *legitimate* interest which the law was designed to protect; *it is, on the contrary, a wrong which the law was enacted to remedy.*

INTERESTS OF THE PUBLIC TO BE PREFERRED.

It may also be noted that the words "interests of the public" refer to the interests of the communities at the points of shipment and points of destination or consumption of the traffic, *as distinguished from the interests of the carriers.*

As railroads derive their franchises, their very right of existence, from the public, and the *consideration upon which those franchises are given is the promotion of the public good*, the interest of the public should be held to be paramount, and in cases of conflict should be preferred. As said by this court (Mr. Justice Brown delivering the opinion) in *Union Pacific Co.* v. *Goodrich* (149 U. S., 680), the roads are "*bound to deal fairly with the public, upon whose will they are dependent for their corporate existence.*"

Necessity for regulation of railways in the interest of the public.

When railways came into operation they superseded other modes of transportation and obtained a practical *monopoly as to hauls of any length.* They have an absolute monopoly over their own roadbeds, whereas public highways by land and sea are free to all.

It is this monopoly which, both in England and this country, has called for legislation, in the interest of the

public, regulating railways and their charges. In *Attorney-General* v. *B. & D. J. Ry. Co.* (2d English Railway and Canal Cases, pp. 132, 133) the lord chancellor said that the object of Parliament in its several enactments for the regulation of railways and their charges was to prevent "those who should get the monopoly of the carriage of the public from exercising that monopoly to the prejudice of individuals." Our act to regulate commerce *protects localities* as well as individuals (sections 3 and 4, act to regulate commerce).

The primary if not sole object of the act to regulate commerce is the protection of the interests of the public.

RELATIVE MAGNITUDE OF THE PUBLIC INTERESTS INVOLVED AT ATLANTA OR OPELIKA ON THE ONE HAND AND AT THE SHORTER-DISTANCE POINTS ON THE OTHER.

ERROR OF JUDGE NEWMAN IN COMPARING ATLANTA WITH THE SHORTER-DISTANCE POINTS SINGLY.

The circuit court (Judge Newman) makes the mistake of comparing Atlanta with *each* of the localities discriminated against *singly*, and not with the whole of them combined. He says:

"As a matter of general public knowledge, Atlanta is many times as large *as either* of the points on the Western and Atlantic Railroad as to which complaint is made. (Record in Case 69, p. 254.)

In determining the *extent of the public interest* involved as between Atlanta and the localities discriminated against, comparison should be made with the latter *taken together, and not singly.* Atlanta is not "many times as large as" ALL THE localities discriminated against for the 138 miles between Atlanta and Chattanooga, and for the 171 miles between Atlanta and Augusta, and for the 109 miles between Atlanta and Opelika.

The population of Atlanta does not equal that of the territory in which these shorter distance points are located, and the agricultural and mineral resources and commercial possibilities of this territory, *which are now dormant and undeveloped because of discrimination in rates*, are of vastly greater and more far-reaching importance than that of any public interest involved at Atlanta.

Conceding for argument's sake, however, that the public interests concentrated at Atlanta are larger and more important than the public interests involved at all these shorter distance points and the territories surrounding them, and that rates preferential to Atlanta are necessary to perpetuate her supremacy over surrounding localities, does that justify such preferential rates?

In the case of *Henry W. Behlmer* v. *The Louisville and Nashville R. R. Co. et al.* (83 Fed. Rep., 898).

Judge Goff, delivering the opinion of the circuit court of appeals for the fourth circuit, said:

"The appellees contend that the smaller charge for the greater distance is, in this case, of great importance to the city of Charleston" (the longer-distance point), "as well as to the section of country adjacent thereto, as by means thereof the merchants of that city are enabled to build up a trade that otherwise would be lost to them. That may be true, but is not the same argument applicable to Summerville" (the shorter-distance point) "and other interior cities along the lines of the roads operated by the appellees between Charleston and Memphis? *In order to build up one locality we should not tear down many others; and justice to one section should not be purchased at the expense of another.*" (Italics are mine.)

The superiority in population and commercial importance of these longer distance trade centers—Atlanta and Opelika—over each of the shorter distance points, *considered separately*, is largely due to the rate discrimination in favor of the former and against the latter complained of in these cases. There is no *natural reason* for the preeminence of these trade centers in this territory. (See testimony of Mr. Allen Fort in answer to direct interrogatories 9, 10, and 12, record in Case 69, p. 104.)

There should be a distribution of commerce and population, and not a monopoly or centralization at a few favored localities.

If, under a nondiscriminative adjustment of rates, the shorter distance points should draw some commerce and population from the basing points, Atlanta or Opelika, they will only be getting back that of which they have heretofore been unjustly deprived under the existing adjustment of rates.

The increased prosperity of the shorter distance points, however, need not be at the expense of the longer distance basing points. These shorter distance points will have the whole world to draw from, just as is the case with the longer distance basing points.

In the language of Mr. Aldace F. Walker, an eminent railroad authority, the prosperity of the shorter distance points "*would not be at the expense of*" *basing points*, "*but would, in its reflex action and by necessary laws, ultimately work in their favor also.*"

CONTENTION IN BEHALF OF THE COMMISSION.

We contend—

(1) That no *legitimate* interests of Atlanta or Opelika will be injuriously affected by establishing a just relation between the rates to those cities and to shorter distance noncompetitive surrounding points.

(2) That no ultimate loss of revenue will result to the carriers from the establishing of such relation, but that their revenue will be increased by the building up

of the trade and business of the shorter distance points and the consequent increase in tonnage of traffic hauled to those points.

(3) That the loss, if any, to the shipping points, Baltimore, Philadelphia, New York, Boston, and Cincinnati, in trade to Atlanta or Opelika, will be compensated, or more than compensated, by the increase in their trade to the shorter distance points.

IT IS BEYOND QUESTION THAT THE RIGHTFUL INTERESTS OF THE SHORTER DISTANCE POINTS WILL BE PROMOTED.

Chapter XXVII.

SHORTER-DISTANCE POINTS ARE COMPETITIVE POINTS.

IF THE FORCE OF COMPETITION AT LONGER-DISTANCE POINTS IS GREATER THAN AT SHORTER-DISTANCE POINTS, IT IS NOT SO MUCH GREATER AS TO JUSTIFY HIGHER RATES TO THE LATTER THAN TO THE FORMER, BUT AT MOST EQUAL RATES.

We also maintain that the *higher* rates to the shorter-distance points than to the longer-distance points are not justified, because the shorter-distance points are shown to be competitive points as well as the longer-distance points.

On cross-examination all the railroad officials, witnesses for the defendants, testified that all the through lines which can be formed from New York to Opelika and to Atlanta and from Cincinnati to Atlanta can also be formed to the shorter-distance points by combinations with the road or roads on which those shorter-distance points are located; that through rates by these various lines are the same to each of the shorter-distance points; that those through rates are

published, and the agents of the different lines to the shorter-distance points *advertise* for and solicit traffic from New York and other northeastern cities and from Cincinnati to the shorter-distance points in *competition* with each other.

Answers to cross-questions 43–47, record, case 69, page 196.

Answers to cross-questions 48–52, record, case 70, page 150.

Answers to cross-questions 44–48, record, case 68, page 166.

Competitive points are defined to be points for the transportation of traffic to which two or more transportation lines compete. It is immaterial that a locality is situated on only one road, if that road forms connections with lines of carriers which advertise and compete for business to that locality.

It is said, on the part of the carriers, that while there is competition to the shorter distance points, it is less in degree of force than that to the longer distance points, and, therefore, that the higher rates to the shorter distance points are justified. The court is called upon to weigh the two competitions and to ascertain whether the one so far exceeds the other as *not only to overcome the advantage in distance which*

the shorter distance points have over the longer distance points, but also to justify higher rates to the shorter distance points than to the longer distance points.

We insist that the competition at the longer distance points is not so much greater than at the shorter distance points as to justify *higher rates at the shorter distance points, but that at most it should only be held to neutralize the advantage in distance of the shorter distance points and authorize the same rates to the shorter distance points, and not rates higher than to the longer distance points.*

This, as we have shown, has been the effect of competition in trunk-line territory and other sections of the country outside of Southern territory.

Chapter XXVIII.

ORDERS OF THE COMMISSION.

HOW THE ORDERS OF THE COMMISSION MAY BE COMPLIED WITH.

ERRONEOUS ASSUMPTION OF COUNSEL FOR CARRIERS THAT COMPLIANCE WITH THE ORDERS REQUIRES EITHER AN ADVANCE OF THE RATES TO THE LONGER-DISTANCE POINTS OR A REDUCTION OF THE RATES TO THE SHORTER-DISTANCE POINTS TO THE FULL EXTENT OF THE PRESENT DIFFERENCE BETWEEN THOSE RATES.

MAY BE COMPLIED WITH BY A SIMULTANEOUS ADVANCE OF LONGER-DISTANCE RATES AND REDUCTION OF SHORTER-DISTANCE RATES IN CERTAIN PROPORTIONS OF THE PRESENT DIFFERENCE BETWEEN THOSE RATES.

SHOULD BE OBEYED BY REDUCING RATES TO SHORTER-DISTANCE POINTS.

ORDERS JUST AND REASONABLE.

ORDERS ADAPTED TO ENFORCEMENT OF EITHER SECTION 3 OR SECTION 4.

ADMISSION OF COUNSEL FOR CARRIERS ON THIS SUBJECT.

The orders of the Commission, as we have seen, are simply that the rates to the shorter-distance points shall not be higher than the rates to the longer-distance points, and it is left to the discretion of the carriers to comply with these orders by advancing the rates to Atlanta and Opelika or by reducing the rates to the shorter-distance points, or by both such advance and reduction in certain proportions.

The theory of counsel for the carriers, and upon which he framed his interrogatories to his witnesses in these cases, is that the orders of the Commission can only be obeyed by advancing the rates to the longer-distance points or reducing the rates to the shorter-distance points to the *full extent* of the difference now existing between those rates. In answer to interrogatories framed on this assumption, his witnesses gave it as their opinion that such advance of rates to the longer-distance points would divert the traffic from the lines of defendants to other lines, and that such reduction in rates to the shorter-distance points would result in an unreasonable loss of revenue.

It is manifest, however, that this is an erroneous assumption, and that the evidence in answer to interrogatories framed on that assumption is valueless. The rates to the shorter distance points may be made not higher than those to the longer distance points—Atlanta

and Opelika—by reducing the shorter distance rates to the extent of one-fourth, one-third, one-half, two-thirds, or other proportion of the difference between the two sets of rates and simultaneously advancing the rates to Atlanta or Opelika to the extent of three-fourths, two-thirds, one-half, one-third, or other proportion of that difference.

Order should be complied with by reducing rates to shorter distance points.

It would appear, however, that the orders of the Commission should be complied with by reducing the rates to the shorter distance points and not by advancing the rates to the longer distance points. It is proven by witnessess for the carriers—railroad officials—that the rates to the longer distance points are reasonable in themselves, and yield the carriers a *proper* compensation in excess of the cost of service to those points. *An increase of those rates, therefore, would make them yield a compensation in excess of a proper compensation over and above the cost of service, and would, therefore, render them excessive, in violation of section 1 of the law.*

The rates to the shorter distance points, moreover, are shown to be unreasonably high, and should therefore be reduced. If reduced to the level of the rates to the longer distance points, they will yield a rate per ton per mile greater than the rate per ton per mile to

the longer distance points, and if reasonably high when applied to the longer distance points will certainly be not unreasonably low when applied to the shorter distance points.

It will be assumed, therefore, that the order of the Commission should be complied with, not by advancing the rates to the longer distance points, but by reducing he rates to the shorter distance points, so as to make them *at least* not higher than the rates to the longer distance points.

Orders of Commission just and reasonable.

The order of the Commission in the "Chattanooga Case" was of the same character as the orders in the present cases, namely, that the rates to Chattanooga should not be higher than those to Nashville. Judge Severens, in the "Chattanooga Case," in speaking of this order, said: "*It is a just and reasonable order, and as near to the court's sense of justice of the case as any the court could devise.*"

Judge Severens further says:

"If the through rates" (for the longer haul through Chattanooga) "to Nashville afford a fair profit to the carriers, there is substantial ground for contending that the *same* charge for carrying freight from the east to Chattanooga would afford a reasonable profit and would, therefore, be a reasonable charge."

Orders of Commission afford proper remedy under section 3 as well as section 4 of the law.

The order of the Commission, it will be observed, is equally as well adapted to the enforcement of section 3 as to the enforcement of section 4 of the law.

It will not only do away with the higher rates for the shorter hauls than for the longer hauls, *forbidden by section 4*, but also remedy the unjust prejudice or disadvantage to the shorter-distance points resulting from the higher rates to those points, *forbidden by section 3*.

Because of the higher rates to the shorter-distance points than to the longer-distance points, the merchants of the former are unduly prejudiced and placed at an unjust disadvantage in that, as shown by the testimony, merchants at the shorter-distance points are unable to compete on equal terms with Atlanta or Opelika merchants, not only in territory at and immediately around the shorter-distance points, which is naturally tributary to them, but also in territory equidistant from the shorter and longer distance points.

By removing the cause, namely, the higher rates to the shorter distance points, the orders of the Commission will enable merchants at shorter distance points to compete on equal terms in territory naturally tributary to them with merchants at longer distance points, and do

away with the undue prejudice or disadvantage now existing, *thus giving the proper relief under section 3.*

Counsel for the carriers, while contending that the Commission erred in basing its orders, as he alleges it did, on the fourth section of the law only, yet admits that—

"Though the Commission may have erred in basing the orders made by it in these cases on the fourth section, *yet if said orders are lawful under the third section it will be the duty of the court to enforce them.*" (Page 44, printed argument of counsel for defendants filed in circuit court.)

And again he says:

"Though the circumstances and conditions at the longer distance points may be substantially dissimilar from those at the shorter distance points, and though such dissimilarity may take the case out of the operation of the fourth section, the third section remains, and if it can be shown that the disparity in rates constitutes an undue preference of the longer distance points, the orders of the Commission ought to be enforced."

Chapter XXIX.

ORDERS OF THE COMMISSION, CONTINUED.

CRITICISM BY COURT BELOW AND BY COUNSEL FOR CARRIERS THAT DISCRIMINATION MAY BE PRACTICED UNDER THEM.

COMMISSION CAN ONLY APPROXIMATE JUSTICE IN ITS ORDERS. A HALF LOAF IS BETTER THAN NO LOAF.

ORDERS IN THESE CASES OF EXACTLY THE SAME CHARACTER AS ORDER APPROVED BY THIS COURT IN THE "SOCIAL CIRCLE CASE."

ORDERS MAY BE MODIFIED.

The orders of the Commission in these cases do not require or render it necessary that the carrier should make the rates to the shorter distance points *as high* as to the longer distance points, but only that the rates to the shorter distance points *shall not be higher* than to the longer distance points.

These orders are criticised by the court below and by counsel for the carriers in his printed argument because they do not "*enjoin* the carriers from charging as high

compensation to the shorter distance points as to the longer distance points." In other words, they are objected to on the ground that the carriers, if they see proper, may, while complying with the *letter* of the orders, still practice discrimination against the shorter distance points.

If they still practice such discrimination, it will be in pursuance of their own volition and not a necessary or natural incident of obedience to the orders.

Counsel for the carriers, in raising this objection to the orders, confesses that even as high rates to the shorter-distance points as to the longer-distance points are a discrimination.

If this be so, how much greater must be the discrimination under the existing higher rates to the shorter-distance points than to the longer-distance points?

"A half loaf is better than no loaf." Some measure of relief is better than none at all. Even if the orders of the Commission do not compel the carriers to extend to the shorter-distance points the *full measure of relief* due them under section 3 of the law, and the carriers should take advantage of this by exacting as high rates to the shorter-distance points as to the longer-distance points, still the giving to the shorter-distance points rates not higher than those to the longer-distance points will greatly reduce or alleviate the unreasonable

prejudice or disadvantage to which the shorter-distance points are subjected under the present adjustment of rates.

It would be a hard rule, indeed, that would require an order of the Commission to "*possess all the inclusive and exclusive qualities of a plea in abatement*," particularly when it is considered that the Commission, under the construction of the law placed upon it by the courts, is not authorized to prescribe reasonable maximum or minimum rates.

If the Commission had this power to prescribe rates, it could possibly administer *exact* justice, but without this power it can only *approximate* justice. It can be no valid objection to the orders in these cases that they only approximate justice when it is not in the power of the Commission to enforce exact justice.

The orders of the Commission in these cases, even if complied with by leaving the rates to the shorter-distance points *as high* as those to the longer-distance points, will, as we have seen, *approximate justice*, or make rates to the former less prejudicial than they now are. Judge Severens, in the "Chattanooga case," in speaking of an order of the same kind involved in that case, said: "*It is a just and reasonable order, and as near the court's sense of the justice of the case as any the court could devise.*"

The orders in these cases are of the same nature as the order which was sanctioned by this court in the Social Circle Case. The order in the latter case was equally open to the objection that under it rates to the shorter-distance point, Social Circle, might be made as high as to the longer-distance point, Augusta.

In any event, however, as we have hereinbefore shown, the court is required to "do justice," and, in the language of this court in the Alabama Midland Case, is *not* "*restricted to a consideration merely of the power of the Commission to make the particular order in question.*" The court may, therefore, modify the orders of the Commission if necessary to the ends of justice.

Chapter XXX.

ORDERS OF THE COMMISSION CONTINUED.

IMPOSSIBLE TO FRAME AN ORDER THAT WOULD NOT BE SUBJECT TO THE HYPERCRITICISM OF COUNSEL FOR THE CARRIERS.

HYPERCRITICISM SHOULD NOT BE INDULGED; THE ACT TO REGULATE COMMERCE A REMEDIAL STATUTE AND, THEREFORE, TO BE LIBERALLY CONSTRUED.

PREDICTIONS OF EVIL TO RESULT FROM ENFORCEMENT OF ORDER IN THE "SOCIAL CIRCLE CASE" AND OF THE DECREE OF THIS COURT IN THE "TRANS-MISSOURI FREIGHT ASSOCIATION CASE" NOT FULFILLED.

SUCH PREDICTIONS MADE IN ALL CASES.

Counsel for the carriers criticises the orders of the Commission not only on the ground that under them carriers may, if they see proper, still violate the law by indulging in discrimination, *though not to the same extent as now practiced*, but also on the ground that the orders have a *future* operation.

This latter objection is equally applicable to the order of the Commission sanctioned by this court in the "Social Circle case," and no order of the Commission remedying a violation of any of the provisions of the first four sections of the law can be formulated which would not be open to the same objection. They must all have *future* operation or remedy no abuse.

It is beyond the capacity of any human being—even of counsel for the carriers himself—to formulate an order affording any measure of relief, under either one of the first four sections of the law, which could stand the test of the *hypercriticism* applied by him to the orders of the Commission in these cases.

The act to regulate commerce is highly remedial and should be liberally construed with a view to suppressing the mischief and advancing the remedy. Every reasonable intendment should be indulged in favor of and not against the policy of the law. As said by Judge Pardee in the case of *Missouri Pacific Ry. Co.* v. *Texas and Pacific Ry Co.* (31 Fed. Rep., 862):

"Whether in any particular case there is that competition on the long haul that will justify a lower charge for the long haul than is charged for the short haul under otherwise similar circumstances and conditions must be determined on the facts of the particular case, *keeping in mind that, where the matter is not clear, the object and policy of the law should prevail.*"

"I commend the judge," observes Lord Hobart, "who seems fine and ingenious, so it tend to right equity; and I condemn them who, * * * out of pleasure to show a subtle wit, will destroy * * * ." (Broom's Legal Maxims, 8th American ed., p. 80.) The argument of counsel for carriers is "fine and ingenious;" but it does not "tend to right and equity;" it employs "a subtle wit" for the "destruction of the law itself.

If carriers would exercise but a small proportion of the ingenuity they exhibit in raising objections to the orders of the Commission, they would find little trouble in complying with those orders and conforming their rates to the rules of the law without detriment to themselves and with benefit to all *legitimate* public interests.

In the Social Circle case it was contended, as in the present cases, that compliance with the order of the Commission was impracticable and would bankrupt the roads. *The order was complied with, and no such result has followed.*

When this court rendered its decision in *United States* v. *Trans-Missouri Freight Association* (166 U. S., 290), declaring the contract between carriers involved in that case unlawful, there was great commotion in railroad circles throughout the country. The most eminent railroad officials declared that the decision

would injuriously affect, if it did not prove absolutely destructive to, the interests of carriers. *They claim, however, to have conformed to the decision, and no ruinous results have followed.*

"*Where there is a will there is a way.*" If carriers were animated by a desire to conform to the law rather than by a determination to evade it, there would be no difficulty in complying with the orders of the Commission or the decrees of the courts for the enforcement of the law.

Chapter XXXI.

ORDERS OF THE COMMISSION CONTINUED.

ORDERS PRIMA FACIE LAWFUL; BURDEN UPON THE CARRIERS TO SHOW CLEARLY THAT THEY ARE UNLAWFUL.

NOT SUFFICIENT TO RAISE A DOUBT; MUST BE ENFORCED UNLESS CLEARLY ERRONEOUS.

The maxim or rule that all things are to be presumed "to be rightly done until the contrary is made to appear," which is invoked in aid of acts of public officers, tribunals, and administrative boards, performed in the discharge of their duties, applies with equal force to an order of the Interstate Commerce Commission, which is a bureau, tribunal, or administrative board of the Government established by the law of the land, and *whose orders are not ex parte, but the result of judicial investigation.*

TO RAISE A MERE DOUBT OF THE LEGALITY OF THE ORDER NOT SUFFICIENT.

The Commission has made out a *prima facie* case by showing the issuance of its order and its violation, and the burden is thereby shifted to the defendants to show *clearly* to the satisfaction of the court that the order is

unlawful and should not be enforced. *To raise a mere doubt will not be sufficient.* In the case of *Missouri Pacific Railway Company* v. *Texas and Pacific Railway Company* (31 Fed. Rep., 862), Judge Pardee says:

"*Where the matter is not clear*" (that is, where it is not clear that the carrier is justified in a departure from the rule of the fourth section of the law) "*the object and policy of the law should prevail.*"

In *Interstate Commerce Commission* v. *The Louisville and Nashville R. R. Co. et al.*, in which rates from New Orleans to Lagrange, the shorter-distance point, and to Atlanta, the longer-distance point, were involved, the United States circuit court for the southern district of Alabama (Judge Toulmin) says:

"The court is not so clear as to the proposition that the rates from New Orleans to Lagrange are unreasonable and unjust in themselves and relatively so as compared with the rates to Atlanta. * * * But the findings of fact in the report of the Commission are made by law *prima facie* evidence of the matters therein stated, and the conclusions of the Commission based upon such findings are presumed to be well founded and correct, *and they will not be set aside unless error clearly appears.* The record does not clearly show that the Commission's findings and conclusions on this branch of the case are erroneous—are not in accordance with the law and the evidence—and the court should not overrule or in any other manner interfere with them." (102 Fed. Rep., 709.)

Chapter XXXII.

ORDERS OF COMMISSION CONTINUED.

REDUCTION OF RATES TO SHORTER DISTANCE POINTS WILL NOT RESULT IN ULTIMATE LOSS OF REVENUE TO CARRIERS.

SUCH REDUCTION WILL ENLARGE THE BUSINESS AND HENCE INCREASE THE TONNAGE OF TRAFFIC TO SHORTER DISTANCE POINTS.

OPINION TO THAT EFFECT OF THIS COURT IN THE JOINT TRAFFIC ASSOCIATION CASE (171 U. S., 505).

TESTIMONY TO THAT EFFECT OF HON. ALLEN FORT, A MEMBER OF THE GEORGIA RAILROAD COMMISSION.

TESTIMONY TO THAT EFFECT OF MERCHANTS AT SHORTER DISTANCE POINTS.

OPINION TO THAT EFFECT OF ALDACE F. WALKER, CHAIRMAN OF THE BOARD OF EXECUTIVE OFFICERS OF THE ATCHISON, TOPEKA AND SANTA FE RAILWAY SYSTEM.

ORDERS OF COMMISSION DO NOT AFFECT RATES ON INTRASTATE TRAFFIC, BUT ONLY ON INTERSTATE TRAFFIC.

The main, if not only, objection to compliance with the orders of the Commission by reducing the rates to the shorter distance points is, that it will result in an unreasonable, if not ruinous, loss of revenue to the carriers. The railroad officials, examined as witnesses in behalf of the carriers, expressed the opinion that such will be the result.

These witnesses, however, also express the opinion that a reduction of the rates to the shorter distance points so as to put them in the matter of rates in a position of relative equality with the longer distance points, Atlanta and Opelika, would not increase the business at the shorter distance points and the tonnage of traffic hauled by the roads to those points.

This opinion is given by these witnesses notwithstanding they admitted the well-established fact that Atlanta merchants under the existing adjustment of rates sell goods at Stone Mountain, Conyers, Covington, Social Circle, etc., and in territory around those points in competition with their local merchants, and also at Marietta, Acworth, Cartersville, Kingston, etc., and in territory around those points in competition with their local merchants, and that Opelika merchants sell goods at West Point, Lagrange, etc., and in territory around those points in competition with their local merchants.

This fact is admitted by nearly all the railroad officials examined as witnesses, and is positively testified to by the local merchants at these several points examined as witnesses in behalf of the Commission.

These railroad witnesses also express the opinion that while rates enter into and affect the prices at which merchants can sell their goods, that reducing the rates to the shorter-distance points will not benefit consumers at those points or increase, or tend to increase, the consumption of goods at those points by bringing them within the reach of a greater number of consumers.

These opinions are all contrary to reason and experience, and can only be attributed to the natural bias of these witnesses in favor of the defendants.

These witnesses, as heretofore stated, are the very men who have made and are responsible for the rates to the shorter-distance points. They are naturally strongly biased in favor of their own action, and *when they give their opinion as to the reasonableness of these rates and as to other matters involved in these cases, those opinions are to be viewed and weighed in the light of the fact that they are the opinions of interested parties, naturally strongly biased.*

OPINION OF MR. JUSTICE PECKHAM IN JOINT TRAFFIC ASSOCIATION CASE (171 U. S., 505).

As to the effect of the reduction of the rates to the shorter distance points so as to make them not higher than the rates to their competitors in business, the longer distance points, *in increasing the business and tonnage of traffic to the shorter distance points*, the attention of the court is called to the *opinion of Mr. Justice Peckham* in the case known as "The Joint Traffic Association Case" (171 U. S., 505.) On this point Mr. Justice Peckham says:

"The result of lower rates is generally a *greater demand* for the articles transported, and this greater demand can only be gratified by *a larger supply*, the furnishing of which increases commerce. * * * The natural, direct, and immediate effect of competition is, however, *to lower rates and to thereby increase the demand for commodities* the supplying of which increases commerce, and an agreement whose first and direct effect is to prevent this plan of competition restrains instead of promoting trade and commerce."

This proposition—that lower rates increase the demand for articles transported, and consequently *the tonnage of such articles transported*—is the basis of the decision of the court in that case, it being held that the contract or agreement of the Joint Traffic Association under consideration tended to stifle competition and thus maintain high rates, and thereby to restrain interstate commerce *in lessening the tonnage of such commerce*. In other words, the basis of the decision of the

Supreme Court was that the agreement of the association prevented a reduction of rates on interstate commerce, and in so doing *lessened the amount of such commerce which would be transported under low rates.*

Opinion of the Hon. Allen Fort, of the Georgia railroad commission.

The Hon. Allen Fort, railroad commissioner of Georgia, was examined as a witness in behalf of the Commission, and his testimony on this subject is in line with the opinion of the Supreme Court of the United States. He says, in answer to interrogatories 9, 10, and 12 (Record, Case 69, p. 104; Case 68, pp. 53, 54; Case 70, p. 60):

Answer to interrogatory 9. "The geographical positions of Newnan, Grantville, Hogansville, Lagrange, and West Point, and the territory by which they are surrounded, and of Greensboro, Madison, Social Circle, Covington, Conyers, and Stone Mountain, and the territory by which they are surrounded, and of Marietta, Acworth, Cartersville, Kingston, Adairsville, and Calhoun, and the territory by which they are surrounded, are such that they are capable of further growth; and if rates from New York and other Eastern cities were not higher to those points"—that is, Newnan, Grantville, etc., and Greensboro, Madison, etc.—"and from Cincinnati to Calhoun, Adairsville, etc., were not higher to those points than rates to Atlanta and Opelika, in my opinion their prosperity would be promoted."

Answer to interrogatory 10. "In my opinion, a reduction in rates from New York and other Eastern cities and from Cincinnati to those stations"—that is, the

shorter distance points—"so as to make said rates not higher than rates charged for the haul through those points to Opelika and to Atlanta, would increase the *tonnage* of traffic hauled by the roads to those points."

Answer to interrogatory 12. "The margin of profit is now so small in commercial transactions that a discriminating rate against a locality makes manufacturing and jobbing unprofitable, and a locality so discriminated against can not hold the trade in its own legitimate territory, but more favored localities secure the trade and are built up at the expense of the less favored."

Testimony on this point of merchants at the shorter distance points.

All the merchants at the shorter distance points who were examined as witnesses for the Commission in these cases testified that their business would be increased, and consequently *the tonnage of traffic hauled to the shorter distance points would be increased*, by giving them rates not higher than the rates to Atlanta or Opelika. (See question 16 and answer thereto, Record, Case 70, pp. 38, 40.)

Opinion of Mr. Aldace F. Walker.

We have heretofore quoted from an opinion of Mr. Aldace F. Walker, then a member of the Interstate Commerce Commission, in which opinion he condemns the practice of combining through and local rates, known as the Southern trade center or basing point system.

Mr. Walker was induced to resign his position as Interstate Commerce Commissioner to accept employment offered him by the railroads. He is now and has been for a long time chairman of the board of general and executive officers of the Atchison, Topeka and Santa Fe Railway system, and has become an authority of great weight in railroad circles. While, however, still a member of the Interstate Commerce Commission, in an opinion rendered by him as a member of that Commission, he forcibly demonstrated that the view of the Supreme Court and others on this subject above quoted was correct, using this strong language:

"*The stimulus given to business at intermediate points*" (*by reduction of rates*) "*will increase traffic largely. That proposition has been so often practically demonstrated that no intelligent observer can reject it.*"

The case in which Mr. Walker expressed these views is entitled *In re Tariffs and Classifications of Atlanta and West Point Railroad, et al.*" (3 I. C. C. R., 48, 49). Below is given at some length, as part of this argument, what Mr. Walker says in reference to this matter:

"The chief obstacle in the way of a general compliance with the rule of the fourth section is found in the question of revenue. Carriers in the *Southern States* employ that argument in every case when conformity to the law is suggested. *They say that the railroads must live or there can* be no commerce by rail, and they

insist that any reduction of rates means loss of revenue, which is against the public interest and the carrier's right, unless the rate in question be unreasonable *per se*. But it is not clear that the application of the general rule of the law would involve permanent loss of revenue. The stimulus given to business at intermediate points will increase traffic largely. *That proposition has been so often practically demonstrated that no intelligent observer can reject it.* Moreover, the adjustment required does not necessarily involve immediate loss of revenue. An advance of a single cent, for example, on the various classes and specials composing the large interstate traffic to and from Atlanta would compensate the carriers for very considerable reductions on the comparatively light interstate traffic which is now carried to local points on the Atlanta combination. * * *

"*At present the amount shipped to intermediate points is relatively very small. Giving such points the rates charged at more distant places, if adopted and maintained as a general principle, would necessarily encourage local industry and enterprises.* Such encouragement would not be at the expense of the coast points, but would, in its reflex action and by necessary laws, ultimately work in their favor also. It is customary for dealers at Baltimore, Philadelphia, New York, and Boston to supply interior towns in their vicinity by sales to customers there located—deliveries being made by the stoppage of cars en route for the terminals—at the same rates charged in case they are carried through. The adoption of such a system in the Southern States would not break up the business of distributing points; the methods would be somewhat changed, but the combinations of credit and acquaintance would maintain existing business relations. The operation of this system in the Eastern, Northern, and Western States, by way of developing local communities, has wrought benefits to the country at large which are obvious to the most superficial observer."

Financial condition of roads will be improved by relatively just rates to shorter-distance points.

The distinguished counsel for the carriers frequently refers to the fact that the financial condition of Southern roads is bad, and that very many of those roads are in the hands of receivers. It thus appears that the present policy of the roads has not been a success financially. *The carriers have tried discrimination and the result is bankruptcy. Let them try fair dealing and conformity to the rules of the law.*

The prosperity of a road must be more dependent on that of stations along its entire line than on the prosperity of a few widely separated trade centers or basing points. The present policy of the Southern roads, under the trade-center or basing-point system, which discriminates against local stations in favor of widely separated trade centers or basing points, can not but be suicidal.

In the *Chattanooga Case* (85 Fed. Rep., 110), it is said:

"The court is very strongly inclined to the belief that *the interests of the carriers* would in the long run be better promoted by adhering more closely to the rules of the statute, and public policy would also be advanced not only in the encouragement which would thus be given to the distribution of commerce and population, but also in extending that *equality of privilege* which it is one of the prime objects of the act to regulate commerce to promote."

In any event, however, the financial results to the carrier of a readjustment of rates so as to make them relatively just as between different localities is not the sole test of the propriety or lawfulness of requiring such readjustment.

The right of the public, and every portion of the public, to reasonable rates is always to be considered as well as the revenue of the carrier. This proposition is laid down and enforced by the Supreme Court in the case of *Covington and Lexington Turnpike Company* v. *Sanford et al.* (164 U. S., 578). In that case Mr. Justice Harlan, in delivering the opinion of this Court, said:

"The rights of the public are not to be ignored. It is alleged here that the rates prescribed are unreasonable and unjust to the company and its stockholders. But that involves an inquiry as to what is reasonable and just to the public. * * * The public can not properly be subjected to unreasonable rates in order simply that stockholders may earn dividends. * * * So that the right of the public to use the plaintiffs' turnpike upon payment of such tolls *as in view of the nature and value of the services rendered by the company are reasonable*, is an element in the general inquiry whether the rates established by law are unjust and unreasonable."

Orders of Commission do not apply to INTRASTATE *traffic, but only to* INTERSTATE COMPETITIVE *traffic.*

In this printed argument, counsel for the carriers says:

"The Southern roads can no more afford to carry *all their traffic* at the low rate of profit which they are forced to accept at competitive points than a merchant can afford to sell his *entire line* of goods at the same rate of profit which he is forced to accept upon certain staple articles."

This is a *misleading* statement.

The orders of the Commission do not affect *all traffic*. They only apply to *competitive interstate* traffic, and do not affect the rates to be charged by the defendants on *intrastate* traffic.

All the local traffic of the roads, *which, under a healthy and just adjustment of rates between different localities, would constitute the bulk of their traffic*, is not affected and can not be affected by the orders of the Commission.

Chapter XXXIII.

ORDERS OF COMMISSION CONTINUED.

CONTENTION THAT THE COMMISSION FAVORS EQUAL MILEAGE RATES OR THAT ITS ORDERS WILL RESULT IN SUCH RATES—COST OF SERVICE IGNORED BY CARRIERS.

IMPORTANCE OF DISTANCE RECOGNIZED BY CONGRESS.

In his printed argument, counsel for the carriers contends that the Commission favors, or that the enforcement of its order will result in, equal *mileage* rates.

This is a man of straw, also, which counsel for the carriers proceeds to exterminate with great ease. The Commission has not favored in this or in any case equal mileage rates, and the orders of the Commission, that the rates to the shorter-distance points shall not be in excess of those to the longer-distance points, will not result in equal *mileage* rates except by the voluntary action of the carriers.

If enforced, by leaving the rates to the shorter-distance points as high as the rates to the longer-distance points, the order will result in much higher *mileage* rates to the former than to the latter.

The Commission, so far from favoring equal *mileage* rates, has always expressly held to the contrary, and has sustained the well-established rule recognized by all carriers that *while the aggregate rates increase as the length of the haul increases, the rates per ton per mile decrease as the length of the haul increases.* On this point the Commission says, in *McMorran et al. v. Grand Trunk Railway Company of Canada et al.* (3 I. C. C. R., 252), that—

"Unless there be exceptional conditions which modify the rule, the rate per ton per mile grows less in proportion to the greater distance, while the aggregate of the rate increases with the greater distance;" and that "through rates *are not required to be made on the mileage basis*, but mileage is usually an element of importance, and due regard to distance proportions should be observed in connection with the other considerations that are material in fixing transportation charges."

This position of the Commission is conservative and manifestly correct, and nothing even squinting at *equal* mileage rates can be found in any ruling or decision or order of the Commission.

As to the importance of distance, as it affects the COST OF THE SERVICE of transportation and also *the fixed charges, see Chapter XIII of this argument.*

COST OF SERVICE IGNORED.

Counsel for the carriers contends, however, that neither the *cost of service* nor anything else except com-

petition has anything to do with rates to competitive points; that, in fact, traffic managers do not make the rates to competitive points, but that, to use his language, "they are fixed inexorably and absolutely by competition."

Perhaps, if carriers would pay some attention to *cost of service*, there would be fewer cases of receiverships and bankruptcy among them.

Inasmuch as their contention is that the bulk of their traffic is competitive traffic, and that in making rates on this traffic *they ignore cost of service*, the presumption is legitimate that the alleged inadequate returns from their business as a whole is directly *attributable to the fact that they do not take into account cost of service.*

CONGRESS RECOGNIZES IMPORTANCE OF DISTANCE AS A FACTOR IN RATE MAKING.

It may here be again noted that Congress has expressly recognized and enforced the importance of *distance* as a factor in rate making by forbidding, in section 4 of the law, the greater charge for the shorter than the longer *distance.*

Chapter XXXIV.

EQUALITY OF RIGHT AND EQUALITY OF PRIVILEGE AS DISTINGUISHED FROM ABSOLUTE EQUALITY OF RATES.

EQUALITY OF RIGHTS, AND NOT ABSOLUTE EQUALITY OF RATES, IS CLAIMED FOR THE SHORTER-DISTANCE POINTS IN THESE CASES.

In his printed argument in these cases, counsel for the carriers contends in effect that Judge Severens holds in the Chattanooga case that there must be *absolute equality* of charges, and in support of this makes certain quotations from the opinion of Judge Severens in which he speaks of "the *equality* which the commerce act was enacted to secure" and of "such *unequal* charges" as had been made in that case. Counsel for the carrier then proceeds to demolish this man of straw of his own creation by demonstrating that *absolute* equality of charges to different localities is impracticable.

That Judge Severens did not mean *absolute equality* of rates to different localities is manifest from the following extract from his opinion:

"And public policy would also be advanced by the opposite course, not only in the encouragement which

would thus be given to the distribution of commerce and population, but also in extending that *equality of privilege* which it is one of the prime objects of legislation to promote."

When Judge Severens speaks of "the equality which the commerce act was enacted to secure," he means "equality of privilege;" and when he uses the words "equality of privilege" he uses them in the same sense in which this court uses the words "equality of right" in the following quotation from its opinion in *Interstate Commerce Commission* v. *Cincinnati, New Orleans and Texas Pacific Railway Company* (167 U. S., bottom p. 506):

"And with this knowledge it" (the Commission) "is charged with the duty of seeing that there is no violation of the long and short haul clause; that there is no discrimination between individual shippers, and that nothing is done by rebate or any other device to give preference to one as against another; that no undue preferences are given to one place or places or individual or class of individuals, but that in all things that EQUALITY OF RIGHT, which is the great purpose of the interstate commerce act, shall be secured to all shippers."

It might as well be said that this court, in using the words "*equality of right*," meant absolute equality of rates, as that Judge Severens, in the language used by him, meant such absolute equality.

It has been well said "that this Government is a government based upon *equality of right* and *not upon equality of condition*."

What is meant in this connection by "equality of right" and "equality of privilege" is, simply, that each individual or locality has an equal right to the enjoyment of his or its natural advantages *unhandicapped by discriminations in rates in favor of competitors.*

We adopt as part of our argument in these cases the following extract from the opinion of Judge Deady in *Ex parte Koehler* (31 Fed. Rep., 268), also quoted by counsel for carriers:

"As long as people and places differ so widely in capabilities and facilities, social or business equality is impossible. Society can do no more than to give to each one an *even chance and a fair show to make the most of his or its opportunities*, and to leave the result to circumstances over which it has little, if any, direct control." (Judge Deady, 31 Fed. Rep., 321.)

All we ask is that the shorter distance points in these cases shall, in the language of Judge Deady, have an "EVEN CHANCE AND A FAIR SHOW TO MAKE THE MOST OF THEIR OPPORTUNITIES," unhandicapped by rate discrimination in favor of their competitors.

The language of Judge Severens, which counsel for the carriers criticises so severely, is not so strong as that of this court in *Union Pacific Company* v. *Goodridge* (149 U. S., 690). In that case this court says that carriers, "deriving their franchises from the legis-

lature and depending upon the will of the people for their very existence, are bound to deal fairly with the public * * * and to put all their patrons upon an *absolute equality*."

Chapter XXXV.

BURDEN OF PROOF :

WHEN PREFERENCES ARE SHOWN UNDER SECTION 3 AND THE GREATER CHARGE FOR THE SHORTER THAN THE LONGER HAUL UNDER SECTION 4 OF THE LAW, THE BURDEN IS UPON THE CARRIER TO PROVE A SUBSTANTIAL DISSIMILARITY OF CIRCUMSTANCES AND CONDITIONS.

UNDER SECTION 1 WHEN RATES ARE CHARGED TO BE EXCESSIVE.

CHARGES THAT RATES ARE UNLAWFUL UNDER SECTIONS 3 AND 4 INVOLVE THE REASONABLENESS OF THE RATES UNDER SECTION 1.

IF BURDEN WAS ON THE COMPLAINANT TO SHOW THE EXCESSIVENESS OF THE RATES TO THE SHORTER DISTANCE POINTS, IT HAS BEEN SHIFTED TO THE CARRIERS.

BURDEN UPON CARRIERS TO PROVE MATTERS THE KNOWLEDGE OF WHICH IS PECULIARLY IN THEIR POSSESSION.

Burden of proof under sections 3 and 4 on the carrier to show a substantial dissimilarity of circumstances and conditions.

Section 4 of the law declares the greater charge for the shorter than the longer haul to be unlawful where the transportation to the shorter and the longer distance points is conducted under a "substantial similarity of circumstances and conditions." These words, "substantial similarity of circumstances and conditions," are not in section 3, but this court has held that the preferences in rates mentioned in that section become undue or unlawful when the transportation is conducted under "substantially similar circumstances and conditions."

It was admitted at the hearing below by counsel for the carriers that where the rates to the shorter distance points are higher than to the longer distance points the burden of proof is upon the carrier to show that the higher rates to the shorter distance points are justified by "a substantial dissimilarity of circumstances and conditions."

The same is true as to a charge under section 3 that rates are "discriminative in their nature," or, as those words are applied in the present case, unduly preferential to one locality over another. When discrimination in rates between different localities is shown, the *prima facie* presumption is that it is unjust discrimination and the burden is upon the carrier to show that the transportation to the localities affected is conducted

under "substantially dissimilar circumstances and conditions," and is therefore authorized under the law.

Departures from the long and short haul rule of section 4 are, as heretofore noted, only a species of discrimination between localities, which are embraced in and would have been unlawful under section 3, although not specifically denounced in section 4. As said by Judge Severens in the case of the Interstate Commerce Commission against the East Tennessee, Virginia and Georgia Railroad Company et al., known as the *Chattanooga Case* (85 Fed. Rep., 110)—

The long and short haul clause of section 4 is only one of the *specific* provisions employed for the general purpose of the act. The third section underlies the fourth and supplies the principles on which it rests."

BURDEN OF PROOF WHERE RATES ARE CHARGED TO BE EXCESSIVE. BURDEN SHIFTED TO CARRIERS.

Counsel for the carriers insists, and also states that the Commission has held, that the burden of proof is on the party *alleging the excessiveness of rates under section 1.*

(1) Conceding this to be true, *where the proceeding is under section 1 alone*, the question is presented, whether that burden has not been shifted from the complainant to the defendant carriers in these cases. In Wharton's

Law of Evidence (sec. 367, 3d ed.) it is said "that where a creditor shows facts that raise a *strong presumption* of fraud in a conveyance made by his debtor, the history of which is necessarily known to the debtor only, the burden of proof lies on the debtor to explain it."

We insist that the facts in evidence and upon which we have commented at length in the preceding parts of this argument (see chapter *supra*) raise at least a "strong presumption" of the excessiveness of the rates to the shorter-distance points, and that those facts are sufficient to shift the burden of proof. That presumption being raised, the burden is upon the carriers to rebut it by proof of facts *the knowledge of which is peculiarly in their possession*, to wit, such facts as the original cost of building their roads or the present value of their roads and of their outfit, etc., and a reasonable interest thereon, etc.

The complainant has compared the rates to the shorter and longer distance points, respectively, with a view of showing that the rates to the former are excessive, and in this has the sanction of *common sense*, and also the *judicial* sanction of the court in the "Chattanooga case," in which it is said, as heretofore quoted, that—

"The charges accepted for the longer haul may be referred to for the purpose of considering the reason-

ableness of the charges made for the shorter haul. Such comparisons are applied to every other kind of business, * * * the presumption always being that the compensation charged for the services or thing is sufficient to be reasonable." (85 Fed. Rep., 110.)

The complainant has made actual proof by railroad officials, witnesses for the carriers, that the rates to the longer-distance points yield a "*reasonable* or *proper remuneration* or *compensation*" in excess of the cost of service and a "*sufficient revenue*" in excess of that cost. (Chapter X.)

The complainant has introduced in evidence the *average receipts per ton* per mile on traffic in general and the *estimated cost of carrying 1 ton 1 mile* on such traffic, as reported under the law to the Commission by leading carriers throughout the country, among whom are most of the principal defendants in these cases, and also the averages of the rates per ton per mile of the defendants to all the shorter distance points—which latter averages appear to be from two to six times as high as said average receipts per ton per mile and from three to eight times as high as said estimated cost of carrying 1 ton 1 mile. (Chapter XV.)

The complainant has also made proof of the fact that the rates in question in these cases to the shorter distance points are *composed in part of local rates established for strictly local hauls*, and has further shown that those local rates were fixed with a view of covering

the extra expense of local hauls, and has further proven that the hauls to the shorter distance points are through hauls, and that no part of them are local hauls. (Chapter XVI.)

The charge of local rates, as heretofore shown, where the hauls are not local and the extra expense incident to local hauls is not incurred, nor the extra services incident to those hauls rendered, is *prima facie* excessive, and has been so held in the case of *Augusta Southern R. R. Co.* v. *Wrightville and Tennille R. R. Co.* (74 Fed. Rep., 527).

All of these matters certainly raise a presumption, at least, of the excessiveness of the rates to the shorter distance points, and place the onus upon the carriers of rebutting that presumption.

(2) Where, however, there are *charges under sections 3 and 4* of undue preferences in rates as between localities, the reasonableness in themselves of the rates to the localities alleged to be discriminated against is pertinent or material to the issue presented by such charges. For example, if the rates to one locality are excessive and to another reasonable, this alone would constitute an undue preference in rates.

RULE AS TO BURDEN OF PROOF LAID DOWN BY COMMISSION.

BURDEN OF PROOF WHEN THE KNOWLEDGE OF THE JUSTIFYING CIRCUMSTANCES IS PECULIARLY IN THE POSSESSION OF THE CARRIERS.

The Commission laid down the correct rule as to burden of proof in the case of *McMorran* v. *Grand Trunk Railway of Canada* (3 I. C. C. R., 261) as follows:

"When a rate is *prima facie* disproportionate or relatively unequal, the *onus* is on the carrier to justify its charges when challenged on these grounds. *The knowledge of the justifying circumstances and conditions relied on is peculiarly in the possession of the carrier.*"

In that case the Commission further says in this connection:

"The evidence does not show with any precision what these several expenses" (terminal expenses) "are, either in the aggregate or what would be a fair distribution of them per carload or per hundred pounds of freight. The defendants assume in their brief that the *burden* of showing these expenses was upon the petitioner; but this assumption is altogether erroneous. It would impose on persons conceiving themselves aggrieved by carriers *a difficult and onerous rule of evidence*. It would be impossible for the petitioners to show such facts otherwise than by the *defendants' agents*, and it was clearly the province of the defendants to make them appear."

The rule that the burden is on a party to prove what is peculiarly in his knowledge, whether the proposition be affirmative or negative, is elementary law, and is laid down by all text writers on the subject.

Section 367, 3d ed., Wharton on "Law of Evidence."

Section 79, 15th ed., "Greenleaf on Evidence."

COUNSEL FOR THE CARRIERS PRACTICALLY ADMITTED THAT THE BURDEN WAS UPON HIM TO PROVE THE REASONABLENESS OF THE RATES TO THE SHORTER DISTANCE POINTS.

Counsel for the carriers, realizing that the burden was upon him, under sections 3 and 4, if not under section 1, of proving that the rates to the shorter distance points in these cases were reasonable in themselves, assumed that burden and endeavored to make the proof.

The testimony which he introduced for that purpose is set forth and commented upon in the following Chapter XXXVI of this argument.

Chapter XXXVI.

NATURE OF TESTIMONY INTRODUCED BY COUNSEL FOR THE CARRIERS TO SHOW REASONABLENESS OF RATES TO SHORTER DISTANCE POINTS.

OPINIONS OF BIASED RAILWAY OFFICIALS RELIED UPON.

GROUNDS GIVEN BY THEM FOR THEIR OPINIONS ON THIS SUBJECT.

As stated in the preceding chapter, counsel for the carriers has assumed the burden of proving the reasonableness of the rates to the shorter distance points.

For this purpose he asked all of his witnesses the following question:

Question 8. "State whether or not the rates from New York, Philadelphia, and Boston via Charleston, Augusta, and Atlanta to Newnan, Grantville, Hogansville, Lagrange, and West Point are just or unjust, reasonable or unreasonable, and give your reasons for any opinion you may express." (Record, Case 70, bottom p. 68.)

This question was propounded to Mr. J. M. Culp, traffic manager of the Southern Railway, and the other

railway officials, witnesses in Case 70, and also in Cases 68 and 69. These witnesses in all three cases gave substantially the same answer. The answer of J. M. Culp is as follows:

"They are not unreasonably high, and therefore are just and reasonable to the shipper or consignee. The rates are lower than by another known mode of conveyance. Business is done, and has been done, under these rates profitably to the shippers. The rates to these points are subject to competition as far as Atlanta, and from that point the traffic is charged at no higher rate than the rates fixed by the Georgia railroad commission. The rates are relatively adjusted with respect to rates to points similarly situated in other parts of the same section of the country." (Record, Case 70, bottom p. 6, top p. 69.)

It will be observed that there are *five reasons* given for the witness's opinion that the rates to the shorter distance points are reasonable.

(1) BEGGING THE QUESTION.

The *first* reason assigned is that the rates to the shorter distance points "are not unreasonably high, and therefore are just and reasonable to the shipper or consignee." This, it will be observed, is "*begging the question*," the question being whether or not the rates are unreasonably high.

(2) RATES REASONABLE BECAUSE LOWER THAN WAGON RATES.

The *second* reason given is that "the rates are lower than by any other known mode of conveyance." On cross-examination other witnesses who had given the same reason stated that the other mode of conveyance referred to was conveyance by wagons and teams. It needs no argument to show that the fact that rail rates are less than wagon rates is no proof of the reasonableness of the former. There is no analogy between the two, and such a comparison is absolutely valueless. Railroads extend thousands of miles and haul thousands of tons of traffic where a wagon line would run a few miles and haul a few hundred pounds of traffic.

(3) RATES REASONABLE BECAUSE NOT PROHIBITORY.

The *third* reason given is that "business is done . . . has been done under these rates profitably to the shippers." This simply amounts to a statement that traffic has moved under the rates—in other words, that they are not prohibitory. This is manifestly no proof of the reasonableness of rates. *Traffic may move under rates which are excessive, and that, too, with profit to the shippers.*

On cross-examination all of these witnesses stated that they would consider rates reasonable under which "the *traffic would move* and not be diverted to other lines." (Record, Case 69, top p. 166; Case 68, p. 156; Case 70, p. 105.)

This shows the *principle* or true *inwardness* of rate making by carriers. A rate under which traffic will not move is prohibitory, and therefore the opinion of these railroad officials is that any rate is reasonable which is not *prohibitory*.

There is always a *wide margin* betweeen a rate reasonably remunerative to the carrier and a rate under which traffic will not move, or, in other words, a prohibitory rate. *Traffic will move under excessive rates.* (See Chapter ——.) Shippers or consignees are entitled to rates which yield the carrier only a reasonable compensation, and carriers are entitled to no higher rates.

(4) RATES REASONABLE BECAUSE MADE UP OF COMPETITIVE RATES TO LONGER DISTANCE POINT PLUS LOCAL RATE FIXED BY GEORGIA RAILROAD COMMISSION FROM LONGER DISTANCE POINT TO SHORTER DISTANCE POINT.

The *fourth* reason assigned is that the rates to the shorter-distance points "are subject to competiton as far as Atlanta, and from that point the traffic is charged at no higher rate than the rates fixed by the Georgia railroad commission." As we have seen, the fact that parts of these rates are rates fixed by the Georgia railroad commission for local hauls is *prima facie* evidence of the excessiveness of those rates, and not of their

reasonableness. Shorter-distance points are not benefited in their competition with longer-distance points by competitive rates to the latter.

Moreover, as heretofore shown, where the basing point is the longer distance point, this rate so made up embraces compensation for two hauls not in fact made.

(5) RATES REASONABLE BECAUSE OF THEIR "RELATIVE ADJUSTMENT" WITH RESPECT TO RATES, WHICH ARE NOT THEMSELVES PROVEN TO BE REASONABLE.

The *fifth* reason assigned is that "the rates are relatively adjusted with respect to rates to points similarly situated in other parts of the same section of the country." This assumes that the rates to points similarly situated in other sections of the country are themselves reasonable.

Neither "the points similarly situated" nor the rates to those points are given. It is, therefore, impossible to institute a comparison.

These are the reasons given by all the witnesses for the carriers for the opinion that the rates to the shorter distance points are reasonable, and we submit they are wholly insufficient.

At the hearing counsel for the carriers laid great stress upon the fact that the Commission had not intro-

duced proof of the cost of building the roads, and other matters, the knowledge of which is peculiarly in the possession of the carriers. He, however, has wholly ignored the rule which he insists should be enforced as against the complainant. He has introduced no such proof, although it lies peculiarly in the knowledge of his clients.

Chapter XXXVII.

OPINIONS AS EVIDENCE OF MATTERS IN ISSUE. GENERAL RULE THAT THEY ARE NOT ADMISSIBLE.

OPINIONS OF RAILWAY OFFICIALS AS TO THE REASONABLENESS OF THE RATES TO THE SHORTER DISTANCE POINTS, IF ADMISSIBLE, ENTITLED TO LITTLE OR NO WEIGHT, BECAUSE:

(1) THE GROUNDS GIVEN FOR THOSE OPINIONS ARE INSUFFICIENT.

(2) THEY ARE THE OPINIONS OF BIASED WITNESSES.

As we have shown, the reasonableness of the rates to the shorter distance points was one of the matters in issue before the Commission and is now in issue before the courts. The *general rule* of law is that the triers of matters in dispute—the judge or jury, as the case may be—are called upon to form their conclusions from the *facts* before them, and *not upon the opinions* of witnesses.

It may be conceded, however, *for argument's sake*, that the opinions of traffic managers and other rail-

road officials in reference to rates and matters relating to railway management are exceptions to this general rule, and that such opinions are admissible as the opinions of experts even as to the matter in issue.

(Lawson on Expert and Opinion Evidence, 2d ed., pp. 1–3.)

But, if *thus admissible*, the opinions given in these cases are entitled to little or no weight, because, *first*, as we have shown, the reasons given by the witnesses for those opinions are wholly insufficient; and, *secondly*, they are the opinions of witnesses *subject to strong bias*.

These witnesses are the very men who have made and are responsible for the rates to the shorter-distance points. They are naturally strongly biased in favor of their own action, and *when they give their opinion as to the reasonableness of these rates and as to other matters involved in these cases, those opinions are to be viewed and weighed in the light of the fact that they are the opinions of interested parties, naturally strongly biased.*

We do not intimate that these witnesses are *dishonest*, as asserted at the hearing below by counsel for the defendants, but only that they are *human* (not divine) and subject to the human infirmity of bias. The law recognizes this human weakness and allows the fact of interest of a witness to be given in evidence and considered by juries.

As said by the court in the *Chattanooga Case* (85 Fed. Rep., 110), "there is in this no impeachment of the integrity of anyone. It is not a question of *intention*, but whether the thing done is in contravention of the statute."

O

L. A. Shaver,
Sol. for Appellant.
James M. Beck.